

0579  
No. 2576

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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Transcript of Record.

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JAMES B. SMITH, F. C. MILLS and E. H.  
MAYER,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,  
Defendant in Error.

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VOLUME I.

(Pages 1 to 320, Inclusive.)

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Upon Writ of Error to the United States District Court of the  
Northern District of California, First Division.

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F. D. Monckton,



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*In the District Court of the United States, for the  
Northern District of California, First Division.*

Number 5233.

THE UNITED STATES OF AMERICA,

vs.

JAS. B. SMITH, F. C. MILLS, and E. H. MAYER.

**Names of Attorneys.**

For the United States:

MATT. I. SULLIVAN, Esq., and THEO. J.  
ROCHE, Esq., Special Assistants to the At-  
torney General, San Francisco, California.

For the Defendants:

STANLEY MOORE, Esq., and PETER F.  
DUNNE, Esq., San Francisco, California.

---

UNITED STATES OF AMERICA.

*District Court of the United States, Northern Dis-  
trict of California.*

Clerk's Office.

No. 5233.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

JAS. B. SMITH, F. C. MILLS, and E. H. MAYER,  
Defendants,

**Praeipie [for Transcript of Record on Writ of  
Error].**

To the Clerk of said Court:

Sir: Please prepare transcript of record on Writ

of Error in the above-entitled case, and include therein the following:

1. The Indictment.
2. Arraignment and Pleas of defendants, James B. Smith, F. C. Mills and E. H. Mayer, respectively, entered March 3, 1913.
3. Minutes of the Trial beginning with and including the proceedings of December 9, 1913.
4. Verdicts as to defendants, James B. Smith, F. C. Mills and E. H. Mayer, respectively.
5. Motion for Order Vacating Verdict of Jury and Granting New Trial, filed February 28, 1914.
6. Minute Order Denying the Motion for Order Vacating Verdict of Jury and Granting New Trial.  
[1\*]
7. Order for Judgment entered March 19, 1914.
8. Minute Order granting defendants, James B. Smith, F. C. Mills and E. H. Mayer, respectively, thirty days from March 19, 1914, in which to prepare serve, settle and file their Bill of Exceptions.
9. Judgments as to defendants, James B. Smith, F. C. Mills and E. H. Mayer, respectively, entered March 19, 1914.
10. Supersedeas Bonds of defendants, James B. Smith, F. C. Mills and E. H. Mayer, respectively, for appearance hereafter in the District Court of the United States for the Northern District of California or in the Circuit Court of Appeals for the Ninth Circuit, etc., as may be ordered.
11. Petition for Writ of Error, filed May 18, 1914.
12. Order Allowing Writ of Error and Staying

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\*Page-number appearing at foot of page of original certified Record.

Sentence and Execution, etc., filed May 18, 1914.

13. Writ of Error, filed May 18, 1914, both original and copy, and Admission of Service thereon by Clerk of District Court on said date.

14. Return to Writ of Error.

15. Bond for Costs on Writ of Error to the District Court of the United States for the Northern District of California, filed May 18, 1914.

16. Admission of Service of Petition for Writ of Error, Writ of Error, Order Allowing Writ of Error, and Cost of Bond by Special Assistants to the Attorney General, filed May 18, 1914.

17. Citation on Writ of Error, filed May 18, 1914, with Admission of Service thereon by Special Assistants to the Attorney General, both original and copy. [2]

18. Assignment of Errors, filed May 18, 1914.

19. Stipulation and Order Extending Time for Defendants to Prepare, Serve and File a Bill of Exceptions and for Stay of Execution of Judgment, filed April 17, 1914.

20. Stipulations and Orders Extending Time for Defendants to Prepare, Serve, Settle and File Their Bill of Exceptions, filed May 29, 1914, June 23, 1914, July 31, 1914, August 13, 1914, September 1, 1914, September 15, 1914, September 30, 1914, October 15, 1914, November 13, 1914, November 30, 1914, December 15, 1914, and January 15, 1915.

21. Bill of Exceptions, filed January 19, 1915, and Order Settling and Allowing the Same.

22. Stipulations and Orders Enlarging Time to File Record and Docket Case on Writ of Error, filed

September 15, 1914, September 30, 1914, October 15, 1914, November 14, 1914, November 30, 1914, December 15, 1914, January 15, 1915, January 19, 1915, and February 18, 1915.

23. Stipulation and Order Continuing Time for Settlement of Defendants' Bill of Exceptions to and into July term, 1914, filed May 29, 1914, and Stipulation and Order Continuing Time for Settlement of Defendants' Bill of Exceptions to and into November term, 1914, filed October 28, 1914.

24. Stipulation and Order (filed January 19, 1915,) providing that certain Exhibits therein named be Transmitted to the Circuit Court of Appeals in a Volume Separate from, but to be regarded as a Part of, the Bill of Exceptions.

25. Substitution of Attorneys, filed October 30, 1914.

26. This Praecipe.

Dated at San Francisco, California, February 24, 1915.

STANLEY MOORE,

PETER F. DUNNE,

Attorneys for Defendants, James B. Smith, F. C. Mills and E. H. Mayer. [3]

[Endorsed]: Filed Feb. 24, 1915. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [4]



*In the District Court of the United States in and for  
the Northern District of California, First Division.*

**(Indictment.)**

At a stated term of said Court begun and holden at the City and County of San Francisco, within and for the State and Northern District of California, on the first Monday of November in the year of our Lord one thousand nine hundred and twelve.

The Grand Jurors of the United States of America, within and for the State and District aforesaid, on their oaths present: **THAT**

**JOHN L. HOWARD, JAMES B. SMITH, J. L. SCHMITT, ROBERT BRUCE, SYDNEY V. SMITH, F. C. MILLS, E. H. MAYER and EDWARD J. SMITH,**

hereinafter called the defendants, whose more full and true names are to the Grand Jurors unknown, heretofore, to wit, on the first day of January, in the year of our Lord, one thousand nine hundred and four, in the State and Northern District of California, and within the jurisdiction of this Honorable

Violation  
Sec. 36,  
C. C. U. S. Court then and there being, did then and there wilfully, knowingly, unlawfully, wickedly, corruptly and feloniously conspire, combine, confederate and agree, together among themselves and with divers other [5] persons whose names are to the Grand Jurors aforesaid, unknown, and for that reason not herein set forth, to defraud the United States in the manner following, that is to say:

That the said Western Fuel Company was at all the times herein mentioned, a corporation organized, existing and doing business under and by virtue of the laws of the State of California, and was at all of said times engaged in the importation into the United States and the sale of coals for fuel, and in purchasing coals from divers other persons, firms and corporations so importing coals into the United States for fuel;

That the said defendants and said divers other persons whose names are to said Grand Jurors unknown, did plan, confederate, conspire and agree, under the guise and name of the said corporation, to wit, Western Fuel Company, to defraud the United States out of a large part of the import duties on coal imported and brought into the United States by said Western Fuel Company by itself and through other persons, firms and corporations from divers foreign countries, ports and places for said Western Fuel Company, and to defraud the United States out of a large portion of the duties due to the United States on divers shiploads and cargoes of coal so imported by said Western Fuel Company and other persons, firms and corporations as aforesaid and coming into the port of San Francisco, by making and causing to be made false weights and false and fraudulent returns of weights [6] of such cargoes and importations of coal, and by further fraudulently weighing and causing to be weighed by themselves and by the Pacific Mail Steamship Company, a corporation, and by other persons and corporations whose names are to the Grand Jurors

aforesaid, unknown, and for that reason not herein stated, and reported to the United States, the weights of all such importations of coal loaded from the bunkers and barges of said Western Fuel Company for fuel on board vessels propelled by steam, and engaged in trade with foreign countries and in trade between the Atlantic and Pacific ports of the United States, and which ships or vessels were registered under the laws of the United States; and further: to defraud the United States by making, and causing to be made false returns, weights and entries of coal shipped and loaded aboard the transports of the United States Army Service and other Government ships purchasing coal at San Francisco Harbor; and to that end, and for the purpose of carrying out such conspiracy, combination and agreement, to maintain on the docks, wharves and barges owned, operated, controlled and occupied by said Western Fuel Company and by the said defendants at the port of San Francisco, in the State and Northern District of California, scales and weights which were to be and were fraudulently manipulated by the defendants to the end that said scales should record the weights of said coal desired by the defendants, and not the true weights of the coal placed thereon, and the said [7] defendants did so manipulate said scales and weights and the method of weighing thereon, so that said scales and weights did record the weights of coal desired by said defendants, and not the true weight of the coal so placed thereon; and to further cause fraudulent affidavits and statements to be made by the defendants and by each of

them, to the officers of the Government of the United States, and to other persons and corporations whose names are to the Grand Jurors aforesaid, unknown, and for that reason not herein stated, and to the Pacific Mail Steamship Company, a corporation, organized and existing under and by virtue of the laws of the State of New York and engaged in the shipping and transportation of freight and passengers, with offices located in the City and County of San Francisco, and which operated and still operates American registered vessels engaged in foreign trade and buying coal from said Western Fuel Company for the purpose and to the end that said Pacific Mail Steamship should claim from the United States a greater rebate on the drawback of coal duties permitted where coal is loaded upon American registered vessels engaged in foreign trade than the true weight of said coal would permit said Pacific Mail Steamship Company to claim or was due the said Pacific Mail Steamship Company;

And further to cause all coal weighed in, on or about the scales upon which the coal handled by said Western Fuel Company was weighed, to be incorrectly measured and weighed to the end, and for the purpose that the defendants, acting under the name and guise of said [8] Western Fuel Company aforesaid, should receive the profit and gain to be made by such incorrect and fraudulent weight;

That said conspiracy, combination, confederation and agreement was continuously in effect and operation and in process of execution by the said defendants and each of them from and including the first

day of January in the year of our Lord one thousand nine hundred and four, to and including the twenty-fourth day of February, in the year of our Lord one thousand nine hundred and thirteen, and the said conspiracy, combination, confederation and agreement was continuously in operation and in process of execution by said defendants during all of the times mentioned in this indictment, and was continuously in operation and in process of execution by said defendants and each of them during all the times mentioned in each and every overt act hereinafter set forth and alleged in this indictment;

And the Grand Jurors aforesaid on their oaths, aforesaid, do further present that in furtherance of said conspiracy, combination, confederation and agreement and to effect and accomplish the object thereof, the said defendant F. C. Mills did, on the fourth day of January, one thousand nine hundred and thirteen, at the City and County of San Francisco, in the State and Northern District of California, make and enter in the book of the Western Fuel Company kept for the recording of the weight of coal loaded from barges into vessels, [9] the following entry:

“Shinyo Maru ..389.1337

Siberia .....690.1462      1080.559

---

Over 60.1759”

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that in furtherance of said conspiracy, combination, confederation, and agreement, and to effect and accomplish the object



thereof, the said defendant F. C. Mills, did on the ninth day of January, one thousand nine hundred and thirteen, at the City and County of San Francisco, in the State and Northern District of California, make and enter in the book of the Western Fuel Company kept for the recording of the weight of coal loaded from barges into vessels, the following entry:

"Siberia.....	810.19	
Andrew Kelly .....	40.	
G. E. Foster.....	40	890.19

---

Over 20.1299."

And the Grand Jurors aforesaid, on their oaths aforesaid do further present that in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said defendant F. C. Mills, did, on the tenth day of January, one thousand nine hundred and thirteen, at the City and County of San Francisco, in the State and Northern [10] District of California, make and enter in the book of the Western Fuel Company, kept for the recording of the weight of coal loaded from barges into vessels, the following entry:

"Korea.. ....	974.448	
Mathilda.. ....	210.145	1184.593

---

Over 72.1023."

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that in furtherance of said conspiracy, combination, confederation, and agreement and to effect and accomplish the object



thereof, the said defendant, F. C. Mills, did, on the fourteenth day of January, one thousand nine hundred and thirteen, at the City and County of San Francisco, in the State and Northern District of California, make and enter in the book of the Western Fuel Company, kept for the recording of the weight of coal loaded from barges into vessels, the following entry:

“Ex. ‘Comanche’ Wellg.

Ac. Wellington.....444.1270

Steamer China.....556.1795

Over 112.525.”

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said [11] defendant, F. C. Mills, did, on the twentieth day of September, one thousand nine hundred and twelve, at the City and County of San Francisco, in the State and Northern District of California, make and enter in the book of the Western Fuel Company, kept for the recording of the weight of coal loaded from barges into vessels, the following entry:

“Ex. ‘Wellington’

Ac. Off Shore Bunkers..... 107.590

“ Christian Bors.....1597.1180

“ Off Shore Bunkers..... 16.1300

“ Solveig.....1634.1410

Korea...	1363.1010	
Damara...	300.1464	
Nippin Maru...	1699.450	
Tenyo Maru...	268.485	3531.1169

---

Over 175.1169."

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that in furtherance of said conspiracy, combination, federation, and agreement, and to effect and accomplish the object thereof, the said defendant, F. C. Mills, did, on the first day of December, one thousand nine hundred and eleven, at the City and County of San Francisco, in the State and Northern District of California, make and enter in the [12] book of the Western Fuel Company, kept for the recording of the weight of coal loaded from barges into vessels, the following entry:

"Persia.....	209.1916
Korea.....	567.1492

Over 33.1478."

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said F. C. Mills, did, on the sixty day of January, one thousand nine hundred and thirteen, at the City and County of San Francisco, in the State and Northern District of California, pay and cause to be paid to the engineer of the "Shinyo Maru," whose name is to the Grand Jurors unknown and is therefore not stated herein, but who was the engineer

on the said steamship "Shinyo Maru" belonging to and operated by the Toyo Kisen Kaisha, a sum of money equivalent to two and one-half cents per ton for all coal which had been, immediately prior to said payment, loaded on said "Shinyo Maru" by the Western Fuel Company, said payment being in lawful money of the United States and made in order to cause, procure, and induce the said engineer to refrain from disclosing to the officers of the United States the existence and operation by said defendants of the said conspiracy, and thereby to enable the said defendants to continue to consummate the object of the said conspiracy and agreement; [13]

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that in furtherance of said conspiracy, combination, confederation, and agreement, and to effect and accomplish the object thereof, the said defendant, James B. Smith, at the City and County of San Francisco, in the State and Northern District of California, on the thirty-first day of August, one thousand nine hundred and eleven, caused to be paid to the engineer of the "American Maru," whose name is to the Grand Jurors unknown, and is for that reason not herein stated, which said steamship belonged to the Toyo Kisen Kaisha, a sum of money equivalent to two and one-half cents for each and every ton of coal which had been immediately prior thereto loaded aboard said steamship by the Western Fuel Company, said payment being made in order to cause, procure, and induce the engineer aforesaid, to refrain from disclosing to the officers of the United States, the exist-

ence and operation by said defendants of the said conspiracy, and thereby to enable said defendants, to continue to consummate and effect the object of the said conspiracy;

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said defendant, James B. Smith, did, at divers times during the month of December, one thousand nine hundred [14] and twelve, the exact dates in said months being to the Grand Jurors aforesaid, unknown, and therefore not stated herein, go to the Folsom Street Bunkers of the Western Fuel Company on the water front of the City and County of San Francisco, State and Northern District of California;

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said defendant, James B. Smith, did, at divers times during the month of October, one thousand nine hundred and twelve, the exact dates in said month being to the Grand Jurors aforesaid, unknown, and therefore not stated herein, go to the Folsom Street Bunkers of the Western Fuel Company on the waterfront of the City and County of San Francisco, State and Northern District of California;

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that in furtherance

of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said defendant, James B. Smith, did, on the third day of May, one thousand nine hundred and eleven, sign and swear to an affidavit in the following language, to wit:

"I, James B. Smith, Vice-President & Stockholder, Western Fuel Company, do solemnly swear that the [15] merchandise herein described was imported as herein stated; that the duties were paid thereon, as herein shown, without allowance or deduction for damage or other cause, except as herein set forth; and that the said merchandise has been delivered to said Pacific Mail Steamship Company, between Jany. 27 & February 15-11; and that no other certificate of delivery covering the above merchandise has been issued by me.

JAMES B. SMITH,  
Importer.

Sworn to before me this 3 day of May, 1911.

GEO. H. PROBASCO,  
Notary Public in and for the City and County of San  
Francisco, California.

Commission expires April 14, 1913."

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

J. L. McNAB,  
United States Attorney. [16]

Names of Witnesses Appearing Before Grand  
Jury: W. H. TIDWELL.



[Endorsed]: A True Bill. Walter N. Brunt, Foreman Grand Jury. Presented in Open Court and Filed Feb. 27, 1913. W. B. Maling, Clerk. By Francis Krull, Deputy Clerk. [17]

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At a stated term of the District Court of the United States of America, for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Monday the 31st day of March, in the year of our Lord one thousand nine hundred and thirteen. Present: The Honorable WM. C. VAN FLEET, Judge.

#5233.

UNITED STATES

vs.

JOHN L. HOWARD, JAMES B. SMITH, J. L. SCHMIDT, ROBERT BRUCE, SYDNEY V. SMITH, F. C. MILLS, E. H. MAYER and EDWARD J. SMITH.

**(Arraignment and Plea of Defendants.)**

Each of the defendants herein being present in open court with their counsel, on motion of the U. S. Afty., they were called for arraignment; and thereupon duly arraigned upon the Indictment herein against them, and each of said defendants then and there plead not guilty to the Indictment herein, which said plea was by the Court ordered and is hereby accordingly entered. Further ordered that the trial of this case be, and the same is hereby, set for May 20, 1913. It appearing that the defendants are under



bail on another Indictment, by the Court ordered that they be permitted to go on their own recognizance as to this Indictment. [18]

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**[Minutes of Trial, December 9, 1913.]**

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Tuesday the 9th day of December, in the year of our Lord one thousand nine hundred and thirteen. Present: The Honorable M. T. DOOLING, Judge.

#5233.

UNITED STATES

vs.

JOHN L. HOWARD et al.

Defendants herein with their counsel, Messrs. E. J. McCutchen, Stanley Moore, Samuel Knight, Warren Olney, Jr., A. P. Black, J. R. Pringle and Peter F. Dunn; Messrs. Matt I. Sullivan and Theo. Roche for the Government, being present in open court, by the Court ordered that the trial of this case do now proceed.

The following named jurors were duly drawn, sworn to answer questions as to their qualifications, and disposed of as follows:

George Boyd, excused for cause upon challenge of Government. Martin O'Connell, passed. Robert G. Hooker, excused for cause on challenge by Govern-

ment. R. E. Herdman, passed. Joseph Gallagher, passed and excused upon peremptory challenge by defendants. A. C. Christianson, passed. John T. Gilmartin, passed and excused upon peremptory challenge by the Government. C. A. Doss, passed. Fred. Becker, passed. Ernest R. Folger, excused for cause on challenge of Government. A. S. Ferguson, [19] excused for cause on challenge of Government. John H. Masterson, passed. E. H. Tryon, excused for cause on challenge of Government. Charles R. Nauert, passed. Thos. A. Burns, excused for cause on challenge of defendant. George T. Page, excused for cause on challenge of Government. Thos. C. Maher, passed. Wm. F. Murray, passed. Charles K. McIntosh, passed. John Reid, excused for cause on challenge of Government. William K. Beans, passed. B. G. Allen, passed. Further trial continued until to-morrow at 2 o'clock P. M. [20]

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**[Minutes of Trial, December 10, 1913.]**

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Wednesday, the 10th day of December, in the year of our Lord one thousand nine hundred and thirteen. Present: The Honorable M. T. DOOLING, Judge.

#5233.

UNITED STATES

vs.

JOHN L. HOWARD et al.

The defendants with their counsel, counsel for the Government and jurors drawn and called to the box, being present in open court, the further trial of this case was resumed. The following jurors were excused: John H. Masterson, for cause upon challenge by the Government: Wm. F. Murray, excused by consent: The following jurors were then drawn and sworn to answer questions as to their qualifications and disposed of as indicated opposite their respective names:

J. M. Taft passed. Perry Eyre, excused upon challenge by the Government for cause. Charles K. McIntosh, heretofore drawn and examined, was excused for cause on challenge of the Government. Carl W. Martin, excused for cause upon challenge by the Government. Geo. W. McNear, excused for cause on challenge of Government. L. P. Bolander, passed. R. H. Gatley, passed. A. C. Christianson, heretofore drawn and examined, excused upon peremptory challenge by the Government. H. L. Stillwell, excused for cause upon challenge of the Government. C. S. Fletcher, excused for cause upon challenge of the Government. T. Carry Friedlander, excused [21] for cause on challenge of Government. F. H. Babb, passed. C. A. Doss, heretofore drawn and examined, excused on peremptory challenge of defendants.

The present panel of jurors being now exhausted, by the Court ordered that the United States Marshal summon 40 persons qualified to serve as trial jurors to be in attendance on Friday morning at 10 o'clock A. M. After admonishing the jurors in the box, the

Court excused said jurors until Friday, December 12, 1913, at 10 o'clock A. M. The further trial of this case was then continued until said time. [22]

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**[Minutes of Trial, December 12, 1913.]**

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Friday, the 12th day of December, in the year of our Lord one thousand nine hundred and thirteen. Present: The Honorable M. T. DOOLING, Judge.

#5233.

UNITED STATES

vs.

JOHN L. HOWARD et al.

The defendants with their counsel, counsel for the Government and the jury in the box being present in open court, the further trial of this case was resumed. The United States Marshal made return to the order herein directing him to summon 40 persons qualified to serve as *trial from* whom jurors shall be drawn herein. The roll of said return was called and R. C. Miller was noted absent. The following jurors summoned were for cause excused: F. C. Fisher, Chas. F. Banta, A. Fred, and J. T. Turner. The following named jurors were drawn, sworn to answer questions touching their qualifications to serve as jurors and disposed of as set forth opposite their respective names, viz.:

John H. Bromberger, passed. J. M. Taft, heretofore passed and examined, excused on peremptory challenge by the Government. H. Weeks, excused on challenge for cause by the Government. Wm. W. Westover, excused on challenge for the Government. F. H. Babb, heretofore passed and excused on peremptory challenge by the defendants. George W. Hunt, excused on peremptory challenge by the defendants. Ralph G. Williams, excused on peremptory challenge by the defendants J. A. Arnott, excused on peremptory challenge by the defendants. Martin O'Connell heretofore drawn and examined, [23] excused on peremptory challenge by the defendants. Chas. Hewitt, excused on peremptory challenge by the Government. Chas. R. Nauert, heretofore drawn and examined, excused for cause on challenge of the Government. J. F. Logue, excused on peremptory challenge by the defendants. Henry Hufschmidt, excused on peremptory challenge by the Government. Joseph Court excused on peremptory challenge by the defendants. J. W. Brockmann, passed. Joseph Stockler, passed. H. L. Young, excused on peremptory challenge of the defendants. L. J. Borie, excused for cause on peremptory challenge by the Government. J. M. Gregory, excused on challenge for cause by the defendants. P. W. Treacy, passed. William Long, passed.

The following named jurors were duly accepted, sworn and impanelled to try this case, viz.: R. E. Herman, Fred. Becker, Thomas C. Maher, William K. Beans, B. G. Allen, L. P. Bolander, R. H. Gatley,



John H. Bromberger, J. W. Bockman, Joseph Stackler, P. W. Treacy and William Long.

The remaining jurors summoned by the U. S. Marshal, excused from further attendance. The jury after being duly admonished, were excused until Monday, December 15, 1913, at 10 o'clock A. M., and the further trial of this case was continued until that time. [24]

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**[Minutes of Trial, December 15, 1913.]**

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Monday, the 15th day of December, in the year of our Lord one thousand nine hundred and thirteen. Present: The Honorable M. T. DOOLING, Judge.

#5233.

UNITED STATES

vs.

JOHN L. HOWARD et al.

The defendants with their counsel, counsel for the Government, and the jury sworn to try this case being present in open Court, the further trial of this case was resumed. On motion of Stanley Moore, Esqr., and the statement that defendant J. L. Schmitt on account of his physical condition asked permission to absent himself during the trial and that he waived all objection, and all other defendants waiv-



ing any objection and counsel for the Government consenting thereto, by the Court ordered that said permission be, and the same is hereby, granted. Further ordered that all witnesses be excluded from the courtroom during the trial of the case, except witness Tidwell. Mr. Wulivan then stated the case to the court and jury, and thereupon Warren Olney, Jr., made reply opening statement in behalf of defendants. Mr. Roche called Milton M. David, Hugh Donigan, who were each duly sworn and examined on behalf of the Government, and introduced in evidence certain exhibits, which were marked United States Exhibits, number 1 to 8 inclusive. Further trial continued until to-morrow at 10 o'clock A. M.

[25]

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**[Minutes of Trial, December 16, 1913.]**

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Tuesday, the 16th day of December, in the year of our Lord one thousand nine hundred and thirteen. Present: The Honorable M. T. DOOLING, Judge.

#5233.

UNITED STATES

vs.

JOHN L. HOWARD et al.

The defendants with their counsel, counsel for the Government, and the jury sworn to try this case,

being present in open court, the further trial of this case was resumed. Witness Bly for the Government permitted to leave the State to return and be present on December 22, 1913. Mr. Roche recalled Hugh Donigan for further examination and called Thomas H. Selvage, C. C. Dickson, and D. C. Norcross, who were each duly sworn and examined for the Government. The United States introduced certain exhibits, which were marked U. S. Exhibits 9 to 20, inclusive. The defendants introduced certain exhibits which were marked Defendants' Exhibits "A" to "I," inclusive. The further trial of this case was then continued until to-morrow at 10 o'clock A. M.

[26]

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**[Minutes of Trial, December 17, 1913.]**

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Wednesday, the 17th day of December, in the year of our Lord one thousand nine hundred and thirteen. Present: The Honorable M. T. DOOLING, Judge.

#5233.

UNITED STATES

vs.

JOHN L. HOWARD et al.

The defendants with their counsel, counsel for the Government, and the jury sworn to try this case, being present in open court, the further trial of this

case was resumed: Mr. Roche called U. G. Edwards, Guy M. Watkins, F. B. Winebrener, who were each duly sworn and examined on behalf of the Government and recalled D. C. Norcross, and introduced in evidence certain exhibits, which were marked United States Exhibits 21 to 99, inclusive. The further trial of this case was then continued until to-morrow at 10 o'clock A. M. [27]

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**[Minutes of Trial, December 18, 1913.]**

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Thursday, the 18th day of December; in the year of our Lord one thousand nine hundred and thirteen. Present: The Honorable M. T. DOOLING, Judge.

#5233.

UNITED STATES

vs.

JOHN L. HOWARD et al.

The defendants with their counsel, counsel for the Government, and the jury sworn to try this case, being present in open court, the further trial of this case was resumed. Mr. Roche recalled D. C. Norcross, who was further examined and introduced in evidence certain exhibits which were marked U. S. Exhibits numbered 100 to 122, inclusive. The further trial was then continued until to-morrow at 10 o'clock A. M. [28]

**[Minutes of Trial, December 19, 1913.]**

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Friday, the 19th day of December, in the year of our Lord one thousand nine hundred and thirteen. Present: The Honorable M. T. DOOLING, Judge.

#5233.

UNITED STATES

vs.

JOHN L. HOWARD et al.

The defendants with their counsel, counsel for the Government, and the jury sworn to try this case, being present in open court, the further trial of this case was resumed. Mr. Stanley Moore recalled D. C. Norcross for further cross-examination. The Government then called G. L. Hahn and W. H. Tidwell, who were each duly sworn and examined for the Government, and introduced in evidence certain exhibits which were marked U. S. Exhibit No. 123. The further trial was thereupon continued until Monday, December 22, 1913, at 10 o'clock A. M.

[29]

**[Minutes of Trial, December 22, 1913.]**

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Monday, the 22d day of December, in the year of our Lord one thousand nine hundred and thirteen. Present: The Honorable M. T. DOOLING, Judge.

No. 5233.

UNITED STATES

vs.

JOHN L. HOWARD et al.

The defendants with their counsel, counsel for the Government, and the jury sworn to try this case, being present in open court, the trial of this case was resumed. Mr. Roche called Daniel J. Moyhahan, who was sworn and examined on behalf of the Government, and recalled W. H. Tidwell and called W. H. Dougherty, who was duly sworn and examined on behalf of the Government, and recalled D. C. Norcross and W. H. Tidwell, who were each further examined, and introduced in evidence certain exhibits, which were marked United States Exhibits 123 to 127, inclusive. The further trial of this case was thereupon continued until to-morrow at 10 o'clock A. M. [30]

**[Minutes of Trial, December 23, 1913.]**

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Tuesday, the 23d day of December, in the year of our Lord one thousand nine hundred and thirteen. Present: The Honorable M. T. DOOLING, Judge.

#5233.

UNITED STATES

vs.

JOHN L. HOWARD et al.

The defendants with their counsel, counsel for the Government, and the jury sworn to try this case, being present in open court, the further trial of this case was resumed. Mr. Roche recalled W. H. Tidewell, who was further examined. The Court thereupon adjourned until January 5, 1914, at 10 o'clock A. M. The Government introduced exhibit #128, for identification. [31]



**[Minutes of Trial, January 5, 1914.]**

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Monday, the 5th day of January, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable M. T. DOOLING, Judge.

#5233.

UNITED STATES

vs.

JOHN L. HOWARD et al.

The defendants with their counsel, counsel for the Government, and the jury sworn to try this case, being present in open court, the further trial of this case was resumed. Mr. Roche called Wm. Chisholm, who was duly sworn and examined on behalf of the Government, and recalled D. C. Norcross and W. H. Tidewell for further examination, and introduced in evidence exhibits marked 129 and 130. The further trial of this case was then continued until to-morrow morning at 10 o'clock A. M.

By the Court further ordered that the U. S. Marshal pay the following named persons the amounts set opposite their respective names, for their mileage and attendance as witnesses on behalf of the Government in this case, viz.:

Tong Bellish .....	\$ 3.
T. C. Sawdon.....	3.
Robert Jansen .....	29.30
Harry Wyrick .....	4.80
Robert Sass .....	27.
Philip Genesay .....	27.
Chauncey M. St. John.....	27.
F. B. Winebrenner.....	115.
W. L. Bunker.....	71.80
Chas. Fix .....	3.
Philip Genesay .....	3.
Robert Jansen .....	4.10
James Balestra .....	3.
Henry Nelson .....	30.
Tony Bellish .....	27.
Dan Pallas .....	27.
Wm. Mainland .....	27.
U. G. Edwards .....	110.69
Edward Powers .....	27.
Milton M. David.....	3.
Ed. Powers .....	3.
B. H. Tietjen.....	27.
D. G. Powers.....	27.
Antone Lombardo .....	24.
James Balestra .....	30.40
A. H. Freund.....	29.
Jos. Bley .....	21.
A. J. Paulsen.....	15.
Bud. Hopkins .....	3.
Antone Lombardo .....	3.
D. G. Powers.....	3.
Wm. Mainland .....	3.

Dan Pallas .....	3.	
Thos. T. Sawdon.....	27.	[32]
W. L. Bunker.....	48.	
N. K. Wills.....	110.70	
Henry Nelson .....	3.	
Robert Sass .....	3.	
Chauncey M. St. John.....	3.	[33]

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**[Minutes of Trial, January 6, 1914.]**

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Tuesday, the 6th day of January, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable M. T. DOOLING, Judge.

#5233.

UNITED STATES

vs.

JOHN L. HOWARD, JAMES B. SMITH, J. L. SCHMIDT, ROBERT BRUCE, SYDNEY V. SMITH, F. C. MILLS, E. H. MAYER and EDWARD J. SMITH.

The defendants herein with their counsel, counsel for the Government and the jury sworn to try this case, being present in open court, the further trial of this case was resumed. Mr. Roche recalled W. H. Tidwell for further examination, and pending his examination, the further trial of this case was continued until to-morrow at 10 o'clock A. M. [34]

**[Minutes of Trial, January 7, 1914.]**

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Wednesday, the 7th day of January, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable M. T. DOOLING, Judge.

#5233.

UNITED STATES

vs.

JOHN L. HOWARD, JAMES B. SMITH, J. L. SCHMIDT, ROBERT BRUCE, SYDNEY V. SMITH, F. C. MILLS, E. H. MAYER and EDWARD J. SMITH.

The defendants herein with their counsel, counsel for the Government, and the jury sworn to try this case, being present, in open court, the further trial of this case was resumed. W. H. Tidwell was recalled for further cross-examination, and thereupon, the further trial of this case was continued until tomorrow at 10 o'clock A. M. [35]

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**[Minutes of Trial, January 8, 1914.]**

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Thursday, the 8th day of Janu-

ary, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable M. T. DOOLING, Judge.

#5233.

UNITED STATES

vs.

JOHN L. HOWARD et al.

The defendants herein with their counsel, and the counsel for the Government, and the jury sworn to try this case, being present in open court, the further trial of this case was resumed. Mr. Roche recalled W. H. Tidwell for further examination, and called Michael Costello, Harry Cooper, who were each duly sworn and examined as witnesses on behalf of the Government, and recalled W. H. Tidwell, and called David G. Powers, who was duly sworn and examined as a witness on behalf of the Government. The further trial of this case was then continued until to-morrow at 10 o'clock A. M. [36]

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**[Minutes of Trial, January 9, 1914.]**

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Friday, the 9th day of January, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable M. T. DOOLING, Judge.

#5233.

UNITED STATES

vs.

JOHN L. HOWARD et al.

The defendants herein with their counsel, counsel for the Government and the jury sworn to try this case, being present in open court, the further trial of this case was resumed. Mr. Roche recalled David G. Powers for further examination. The further trial continued until January 12, 1914, at 10 o'clock A. M. [37]

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[Minutes of Trial, January 12, 1914.]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Monday, the 12th day of January, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable M. T. DOOLING, Judge.

#5233.

UNITED STATES

vs.

JOHN L. HOWARD et al.

The defendants herein with their counsel, counsel for the Government and the jury sworn to try this case, being present in open court, the further trial of this case was resumed. Mr. Stanley Moore called



David G. Powers for further cross-examination. The further trial was then continued until to-morrow at 10 o'clock A. M. [38]

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**[Minutes of Trial, January 13, 1914.]**

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Tuesday, the 13th day of January, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable M. T. DOOLING, Judge.

#5233.

UNITED STATES

vs.

JOHN L. HOWARD et al.

The defendants with their counsel, counsel for the Government, and the jury sworn to try this case, being present in open court, the further trial of this case was resumed. Mr. Roche called Edward Powers, who was duly sworn and examined as a witness on behalf of the Government. The case was then continued until to-morrow at 10 o'clock A. M. [39]

**[Minutes of Trial, January 14, 1914.]**

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Wednesday, the 14th day of January, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable M. T. DOOLING, Judge.

#5233.

UNITED STATES

vs.

JOHN L. HOWARD et al.

The defendants herein with their counsel, counsel for the Government, and the jury sworn to try this case, being present in open court, the further trial of this case was resumed. Edward Powers was recalled for further cross-examination. Mr. Roche then called D. C. Norcross for further examination and called J. W. Smith, who was duly sworn and examined on behalf of the Government. The further trial was then continued until to-morrow at 10 o'clock A. M. [40]

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**[Minutes of Trial, January 15, 1914.]**

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San

Francisco, on Thursday, the 15th day of January, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable M. T. DOOLING, Judge.

#5233.

UNITED STATES

vs.

JOHN L. HOWARD et al.

The defendants with their counsel, counsel for the Government, and the jury sworn to try this case, being present in open court, the further trial of this case was resumed. Mr. Roche recalled J. W. Smith for further examination and called Joseph Waterdahl and E. E. Enlow, who were each duly sworn and examined on behalf of the Government. The further trial was thereupon continued until tomorrow at 10 o'clock A. M. [41]

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**[Minutes of Trial, January 16, 1914.]**

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Friday, the 16th day of January, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable M. T. DOOLING, Judge.

#5233.

UNITED STATES

vs.

JOHN L. HOWARD et al.

The defendants herein on trial with their counsel, counsel for the Government, and the jury sworn to try this case, being present in open court, the further trial of this case was resumed. E. E. Enlow was recalled for further cross-examination. Mr. Roche then called Samuel Griffin, W. L. Bunker and Robert Sass, who were each duly sworn and examined on behalf of the Government. The further trial was then continued until Monday, January 19th, 1914, at 10 o'clock A. M. [42]

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[Minutes of Trial, January 19, 1914.]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Monday, the 19th day of January, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable M. T. DOOLING, Judge.

#5233.

UNITED STATES

vs.

JOHN L. HOWARD et al.

The defendants on trial herein with their counsel, counsel for the Government, and the jury sworn to try this case, being present in open court, the further trial of this case was resumed. Robert Sass recalled for further examination. Mr. Roche then called Phillip Ganassi, John Belestra, Tony Belish and Thomas T. Sandon, who were each duly sworn and examined as witnesses on behalf of the Government. The further trial of the case was then continued until to-morrow at 10 o'clock A. M. [43]

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**[Minutes of Trial, January 20, 1914.]**

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Tuesday, the 20th day of January, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable M. T. DOOLING, Judge.

#5233.

UNITED STATES

vs.

JOHN L. HOWARD et al.

The defendants on trial herein with their counsel, counsel for the Government and the jury sworn to try this case being present in open court, the further trial of this case was resumed. Mr. Roche called J. T. F. Burns, Frank Kenna, William G. Read, J. F. Barfield, Arnold H. Freund, Albert Ernest Aitken,

William J. Delancy, J. L. Bley, who were each duly sworn and examined as witnesses on behalf of the Government, and recalled Michael J. Costello for further examination. The further trial of the case was continued until to-morrow at 10 o'clock A. M. [44]

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**[Minutes of Trial, January 21, 1914.]**

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Wednesday, the 21st day of January, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable M. T. DOOLING, Judge.

#5233.

UNITED STATES

vs.

JOHN L. HOWARD et al.

The defendants on trial herein with their counsel, counsel for the Government and the jury sworn to try this case, being present in open court, the further trial of this case was resumed. Michael Costello was recalled for further examination. Mr. Roche called R. Gunderson, Andrew Antzen, Daniel Laitretzen, who were each duly sworn and examined as witnesses on behalf of the Government, and recalled D. C. Norcross for further examination, and called William S. Miller, Edmund M. Atkinson, Charles H. Blinn, Charles T. Cook, Budd. Hopkins, who were each duly



sworn and examined as witnesses on behalf of the Government, and recalled Michael Costello and D. C. Norcross for further examination. The Government here announced the close of its case, and thereupon, the further trial was continued until Monday, January 26, 1914, at 10 o'clock A. M. [45]

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**[Minutes of Trial, January 23, 1914.]**

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Friday, the 23d day of January, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable M. T. DOOLING, Judge.

#5233.

UNITED STATES

vs.

JOHN L. HOWARD et al.

On motion of Matt I. Sullivan, Esqr., Special Assistant to the Attorney-General, and it being made to appear that defendant John L. Howard herein is now deceased, by the Court ordered that the indictment herein be, and the same is hereby dismissed as to said defendant. Mr. McCutchen, Esqr., on behalf of defendants Joseph L. Schmitt and Robert Bruce, made a motion that case be taken from the jury as to said defendants, and that said defendants be discharged as to this indictment. Mr. Samuel Knight, Esqr., made a like motion on behalf of defendants

J. B. Smith, Edward J. Smith, F. C. Mills and E. H. Mayer, and Mr. Peter F. Dunn, Esqr., made a like motion on behalf of defendant Sydney V. Smith, and after hearing argument of respective counsel, the further hearing of this case was continued until tomorrow at 2 o'clock P. M. [46]

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**[Minutes of Trial, January 24, 1914.]**

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Saturday the 24th day of January, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable M. T. DOOLING, Judge.

#5233.

UNITED STATES

vs.

JAMES B. SMITH et al.

The further hearing of the motions to take this case from the jury and to discharge the defendants, this day came on, and after hearing Mr. Sullivan on behalf of the United States, by the Court ordered that this case, as to defendants Robert Bruce, J. L. Schmitt and Sydney V. Smith, be, and the same is hereby, taken from the jury, and said defendants discharged as to the indictment herein against them. Further ordered that the motion as to defendants James B. Smith, F. C. Mills and E. H. Mayer and Edward J. Smith, be, and the same is hereby, denied,

to which ruling of denial an exception was duly taken and entered. [47]

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**[Minutes of Trial, January 26, 1914.]**

At a stated term of the District Court of the United States of America for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Monday, the 26th day of January, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable M. T. DOOLING, Judge.

#5233.

UNITED STATES

vs.

JAMES B. SMITH et al.

The defendants herein on trial with their counsel, counsel for the Government, and the jury sworn to try this case, being present in open court, the further trial of this case was resumed. Mr. Stanley Moore called Arthur Mullan, Frank Wilson, Andrew Rocca, A. J. Schultz, W. R. Olinder, who were each duly sworn and examined, on behalf of defendants. The further trial of the case was then continued until to-morrow at 10 o'clock A. M. [48]

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**[Minutes of Trial, January 27, 1914.]**

At a stated term of the District Court of the United States of America for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Tuesday,

the 27th day of January, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable M. T. DOOLING, Judge.

#5233.

UNITED STATES

vs.

JAMES B. SMITH et al.

The defendants on trial herein with their counsel, counsel for the Government, and the jury sworn to try this case, being present in open court, the further trial of this case was resumed. W. R. Olinder was recalled for further examination. Frank Wilson recalled for further examination. Mr. Moore called Westley Ewing, Fred. Tietjen and John Galloway, who were each duly sworn and examined on behalf of defendants, and recalled David Powers for further examination. The further hearing of the case was then continued until to-morrow at 10 o'clock A. M.

[49]

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[Minutes of Trial, January 28, 1914.]

At a stated term of the District Court of the United States of America for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Wednesday, the 28th day of January, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable M. T. DOOLING, Judge.

#5233.

UNITED STATES

vs.

JAMES B. SMITH et al.

The defendants on trial herein with their counsel, counsel for the Government, and the jury sworn to try this case, being present in open court, the further trial of this case was resumed. The defense called Joseph H. Desmond, John Thos. Linehan, Lawrence Brannan and Thos R. Stockett, who were each duly sworn and examined as witnesses for defendants. By the court ordered that the United States Marshal furnish a suitable conveyance, at the expense of the United States, to take the Court and jury to view the property of the Western Fuel Company, located in this City and County, at 10 o'clock A. M. to-morrow.

The defendants introduced certain exhibits which were marked Defendants' Exhibits "X," "Y," "Z," "AA" and "BB," respectively. The case was then continued until tomorrow at 10 o'clock A. M. [50]

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**[Minutes of Trial, January 29, 1914.]**

At a stated term of the District Court of the United States of America for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Thursday, the 29th day of January, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable M. T. DOOLING, Judge.

#5233.

UNITED STATES

vs.

JAMES B. SMITH et al.

The defendants on trial herein with their counsel, counsel for the Government, and the jury sworn to try this case, being present in open court, the jury, defendants, Court and counsel visited the property of the Western Fuel Company, and the further trial of the case was continued until to-morrow at 10 o'clock A. M. [51]

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**[Minutes of Trial, January 30, 1914.]**

At a stated term of the District Court of the United States of America for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Friday, the 30th day of January, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable M. T. DOOLING, Judge.

#5233.

UNITED STATES

vs.

JAMES B. SMITH et al.

The defendants herein on trial, with their counsel, counsel for the Government, and the jury sworn to try this case, being present in open court, the further trial of this case was resumed. Mr. Olney recalled Thos. R. Stockett, and called Edward Park, who was duly sworn and examined for defendants. The de-



fendants introduced certain exhibits, which were marked Defendants' Exhibits "CC" to "FF," inclusive. The case was continued until February 2, 1914, at further trial. [52]

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**[Minutes of Trial, February 2, 1914.]**

At a stated term of the District Court of the United States of America for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Monday, the 2d day of February, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable M. T. DOOLING, Judge.

#5233.

UNITED STATES

vs.

JAMES B. SMITH et al.

The defendants on trial herein with their counsel, counsel for the Government and the jury sworn to try this case being present in open court the further trial of this case was resumed. Edward Par and Fred. Tietjen were each recalled for further examination. Mr. McCutchen called S. W. Parr, who was duly sworn and examined as a witness on behalf of the defendants. Defendants introduced certain exhibits, which were marked Defendants' Exhibits "DD," "EE," "FF" and "GG" respectively. The further trial of the case was continued until to-morrow. [53]

**[Minutes of Trial, February 3, 1914.]**

At a stated term of the District Court of the United States of America for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Tuesday, the 3d day of February, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable M. T. DOOLING, Judge.

#5233.

UNITED STATES

vs.

JAMES B. SMITH et al.

The defendants on trial herein with their counsel, counsel for the Government, and the jury sworn to try this case, being present in open court, the further trial of this case was resumed. S. W. Parr and D. C. Norcross were recalled as witnesses and further examined. The further trial was thereupon continued until to-morrow at 10 o'clock A. M. The defendants introduced a certain exhibit which was marked Defendants' Exhibit "HH." [54]

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**[Minutes of Trial, February 4, 1914.]**

At a stated term of the District Court of the United States of America for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Wednesday, the 4th day of February, in the year of our

Lord one thousand nine hundred and fourteen.  
Present: The Honorable M. T. DOOLING,  
Judge.

#5233.

UNITED STATES

vs.

JAMES B. SMITH et al.

The defendants on trial herein with their counsel, counsel for the Government, and the jury sworn to try this case, being present in open court, the further trial of this case was resumed. S. W. Parr was recalled for further examination. The further trial was thereupon continued until to-morrow at 10 o'clock A. M. [55]

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**[Minutes of Trial, February 5, 1914.]**

At a stated term of the District Court of the United States of America for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Thursday, the 5th day of February, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable M. T. DOOLING, Judge.

#5233.

UNITED STATES

vs.

JAMES B. SMITH et al.

The defendants on trial herein with their counsel, counsel for the Government, and the jury sworn to

try this case, being present in open court, the further trial of this case was resumed. Mr. Olney called E. E. Sommermeier, J. C. Brannan, who were each duly sworn and examined as witnesses on behalf of defendants, and recalled E. E. Sommermeier for further examination. The Government introduced a certain exhibit which was marked U. S. Exhibit #163. The further trial was thereupon continued until to-morrow at 10 o'clock A. M. [56]

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**[Minutes of Trial, February 6, 1914.]**

At a stated term of the District Court of the United States of America for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Friday, the 6th day of February, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable M. T. DOOLING, Judge.

#5233.

UNITED STATES

vs.

JAMES B. SMITH et al.

The defendants on trial herein with their counsel, counsel for the Government, and the jury sworn to try this case, being present in open court, the further trial of this case was resumed. Mr. S. Knight called Ernest Kroger and David M. Folsom, who were each duly sworn and examined as witnesses on behalf of the defendants. The further trial was then continued until February 9, 1914. [57]

**[Minutes of Trial, February 9, 1914.]**

At a stated term of the District Court of the United States of America for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Monday, the 9th day of February, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable M. T. DOOLING, Judge.

#5233.

UNITED STATES

vs.

JAMES B. SMITH et al.

The defendants on trial herein with their counsel, counsel for the Government, and the jury sworn to try this case, being present in open court, the further trial of this case was resumed. David M. Folsom was recalled for further examinaiton, and the defense called Geo. S. Bohart, Henry Rosenfeld and H. C. Richards, who were each duly sworn and examined as witnesses on behalf of the defendants. The further trial was then continued until to-morrow at 10 o'clock A. M. [58]

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**[Minutes of Trial, February 10, 1914.]**

At a stated term of the District Court of the United States of America for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Tuesday,

the 10th day of February, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable M. T. DOOLING, Judge.

#5233.

UNITED STATES

vs.

JAMES B. SMITH et al.

The defendants on trial herein with their counsel, counsel for the Government, and the jury sworn to try this case, being present in open court, the further trial of this case was resumed. Henry Rosenfeld was recalled for further examination. Defendants called Herbert Stone, Robert Husband, James J. McNamara, R. P. Jensen, Wm. Mainland, Geo. F. Morens, C. P. Caruthers, Edward J. Smith, H. Mayer who were each duly sworn and examined on behalf of defendants, and recalled Fred Tietjen for further examination. The further trial was then continued until to-morrow, at 10 o'clock A. M. [59]

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**[Minutes of Trial, February 11, 1914.]**

At a stated term of the District Court of the United States of America for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Wednesday, the 11th day of February, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable M. T. DOOLING, Judge.



#5233.

UNITED STATES

vs.

JAMES B. SMITH et al.

The defendants on trial herein with their counsel, counsel for the Government, and the jury sworn to try this case, being present in open court, the further trial of this case was resumed. W. H. Tidwell was recalled for further examination. The defense called Warren Olney, Jr., and Arthur O'Leary, who were each duly sworn and examined as witnesses on behalf of the defendants. The Government recalled John Galloway, Wm. Chisholm for further examination. Mr. Moore called Frederick C. Mills, who was duly sworn and examined in behalf of defendants. The further trial of the case was then continued until Friday, February 13, 1914, at 10 o'clock A. M. [60]

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**[Minutes of Trial, February 13, 1914.]**

At a stated term of the District Court of the United States of America for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Friday, the 13th day of February, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable M. T. DOOLING, Judge.

#5233.

UNITED STATES

vs.

JAMES B. SMITH et al.

The defendants on trial herein with their counsel, counsel for the Government, and the jury sworn to try this case, being present in open court, the further trial of this case was resumed. Mr. Moore called Joseph H. Mayer, Michael Carroll, James B. Smith, who were each duly sworn and examined on behalf of defendants and recalled C. P. Carothers for further examination. The defense here announced that it rested. The Government called Albert Lackett, George W. Brown, E. H. Montell, Geo. B. Richardson, Symes H. Hunt, who were each duly sworn and examined as witnesses on behalf of the Government, and recalled Robert Sass, James Bolestra, Geo. W. Brown, D. C. Norcross, Edward Powers. The defense called Frank J. Foran, who was duly sworn and examined on behalf of the defendants. The further trial was then continued until February 16, 1914, at 10 o'clock A M. [61]

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[Minutes of Trial, February 16, 1914.]

At a stated term of the District Court of the United States of America for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Monday, the 16th day of February, in the year of our

Lord one thousand nine hundred and fourteen.  
Present: The Honorable M. T. DOOLING,  
Judge.

#5233.

UNITED STATES

vs.

JAMES B. SMITH et al.

The defendants on trial herein with their counsel, counsel for the Government, and the jury sworn to try this case, being present in open court, the further trial of this case was resumed. Defendants introduced a certain exhibit which was marked "TT." The case was then argued by Theo. J. Roche for the Government and Stanley Moore on behalf of defendants, and thereupon, the further trial was continued until to-morrow at 9 o'clock A. M. [62]

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**[Minutes of Trial, February 17, 1914.]**

At a stated term of the District Court of the United States of America for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Tuesday, the 17th day of February, in the year of our Lord one thousand nine hundred and fourteen.  
Present: The Honorable M. T. DOOLING,  
Judge.

#5233.

UNITED STATES

vs.

JAMES B. SMITH.

The defendants on trial herein with their counsel, counsel for the Government, and the jury sworn to try this case, being present in open court, the trial of this case was resumed. The case was further argued by Mr. McCutchen on behalf of defendants and Mr. Sullivan closed for the Government. The Court charged the jury, who at 3:50 o'clock P. M. retired to deliberate upon their verdict. By the court ordered that the U. S. Marshal furnish said jurors and two bailiffs with meals at the expense of the United States. At 12:05 A. M., February 18, 1914, the said jurors returned into court and upon being asked if they had agreed upon a verdict, answered in the affirmative and returned the following verdicts in writing, which were by the court ordered and are hereby recorded, viz.:

"We, the Jury, find J. L. Schmitt, Robert Bruce and Sydney V. Smith, the defendants at the bar, not guilty. Thomas C. Maher, Foreman."

"We, the jury, find Edward J. Smith, the defendant at the bar, not guilty. Thomas C. Maher, Foreman." [63]

"We, the jury, find James B. Smith, the defendant at the bar, Guilty as charged. Thomas C. Maher, Foreman."

"We, the jury, find F. C. Mills, the defendant at the bar, Guilty as charged. Thomas C. Maher, Foreman."

"We, the jury, find E. H. Mayer, the defendant at the bar, Guilty as charged. Thomas C. Maher, Foreman."

By the Court ordered that Saturday, February

21st, 1914, be, and the same is hereby, fixed as the time for pronouncing judgment herein. [64]

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*In the District Court of the United States, for the Northern District of California, First Division.*

No. 5233.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JAMES B. SMITH et al.,

Defendants.

**Proposed Bill of Exceptions.**

BE IT REMEMBERED that on the ninth day of December, A. D. 1913, at a stated term of the District Court of the United States for the Northern District of California, First Division, the above-entitled cause came on regularly for trial before Honorable Maurice T. Dooling, United States District Judge, presiding; Matt. I. Sullivan, Esq., and Theodore J. Roche, Esq., Assistants to the Attorney General of the United States, appearing for the plaintiff, and Edward J. McCutchen, Esq., and Warren Olney, Jr., Esq., of the firm of McCutchen, Olney & Willard, Stanley Moore, Esq., Samuel Knight, Esq., A. P. Black, Esq., of the firm of Black & Clark, and Peter F. Dunne, Esq., of the firm of Morrison, Dunne & Brobeck, appearing for the defendants.

Thereupon, a jury was regularly empaneled and sworn according to law, and opening statements having been made to the jury by counsel for the prosecution and for the defendants, respectively, the evi-

dence hereinafter following was introduced and the following proceedings occurred: [65—1]

**[Testimony of Milton M. Davis, for Plaintiff.]**

MILTON M. DAVIS, a witness called for the United States and sworn, testified as follows:

Direct Examination by Mr. ROCHE.

I am a Deputy County Clerk of the City and County of San Francisco, and have brought with me and have here a certified copy of the Articles of Incorporation of the Western Fuel Company produced by me from the office of the County Clerk of said City and County.

(Said Articles of Incorporation were here introduced in evidence as United States Exhibit Number 1, “for the purpose of showing there is such a corporation, and the purposes for which the corporation is formed, and for any purpose that appears therein, in so far as it bears upon any of the persons whose names are signed to it, and who are defendants here.”)

Counsel for the plaintiff directed the jury’s attention to the incorporators whose names appear signed to said Articles of Incorporation which is in words and figures as follows:

**[U. S. Exhibit No. 1—Articles of Incorporation of  
Western Fuel Co.]**

ARTICLES OF INCORPORATION  
of

WESTERN FUEL COMPANY.

KNOW ALL MEN BY THESE PRESENTS:  
That we, the undersigned, a majority of whom are



citizens and residents of the State of California, have this day voluntarily associated ourselves together for the purpose of forming a corporation under the laws of the State of California. [66—2]

AND WE HEREBY CERTIFY,

FIRST. That the name of said Corporation shall be

WESTERN FUEL COMPANY.

SECOND. That the purposes for which it is formed are

1st. To purchase, own, hold, improve, manage, exchange and sell, rent lease, hire, and deal in real property of every description, including mines, mining claims and mining rights of every nature whatsoever, in California or elsewhere; to buy, sell, own, hold and deal in personal property of all kinds.

2d. To purchase, own, sell and deal in shares of stock and bonds and obligations of public and private corporations, mortgages, pledges and securities of all kinds.

3d. To lend money with or without security and to take all kinds of deeds of trust, mortgages, pledges and securities of real and personal property to secure loans or advances made by it.

4th. To buy, sell and deal in coal, coke, merchandise of all kinds, and to build, buy, own, sell, hypothecate and operate all kinds of steamships, vessels boats and barges.

5th. To borrow money on notes, deeds of trust or mortgages of real property or pledges of personal

property and on stocks, bonds and securities of all kinds.

6th. To engage in mining, to construct, build, buy, own, and operate all kinds of public and private improvements, such as bridges, ferries, wharves, chutes, piers, canals, ditches for draining, agricultural, mining, navigation and other purposes.

7th. To acquire by appropriation, purchase and use [67—3] water and water rights and to sell and lease water for domestic, manufacturing, mining, irrigation and other purposes.

8th. To own, purchase, sell and operate saw mills and planing mills; to carry on and conduct the lumber business in all its branches.

9th. To engage in the business of conducting warehouses.

10th. To generate, sell and lease electricity and electric and water power and to engage in the business of supplying electric and water power and electric lighting to others.

11th. To pass and make by-laws for the regulation of the sale and transfer of the stock of the corporation by providing that no such stock shall be sold by any stockholder or assigned or transferred on the books of the corporation until and unless the stock so sold shall have been first offered for purchase to the other stockholders, and giving power to the Board of Directors at any time in its discretion to rescind any such by-law.

12th. To transact any and all kinds of business in which natural persons may lawfully engage.

THIRD. That the place where the principal

business of said corporation is to be transacted in San Francisco, California.

FOURTH. That the term for which said Corporation is to exist is Fifty years, from and after the date of its incorporation.

FIFTH. That the number of Directors or Trustees of said Corporation shall be five, and that the names and residences of Directors or Trustees, who are appointed for the first year, and to serve until the election and qualification of such officers are as follows, to wit: [68—4]

Names.	Whose Residence is at.
John L. Howard,	Oakland, California.
James B. Smith,	San Francisco, California.
John C. Wilson,	San Francisco, California.
Joseph L. Schmitt,	San Francisco, California.
Sidney V. Smith,	San Francisco, California.

SIXTH. That the amount of the Capital Stock of said Corporation is One Million, Five Hundred Thousand Dollars, and the number of shares into which it is divided is Fifteen Thousand of the par value of One Hundred Dollars each.

SEVENTH. That the amount of Capital Stock which has been actually subscribed is Twenty-five Hundred Dollars, and the following are the names of the persons by whom the same has been subscribed, to wit:

Names of Subscribers.	No. of Shares.	Amount.
John L. Howard,	Five	Five Hundred Dollars.
James B. Smith,	Five	Five Hundred Dollars.
John C. Wilson,	Five	Five Hundred Dollars.
Joseph L. Schmitt,	Five	Five Hundred Dollars.
Sidney V. Smith,	Five	Five Hundred Dollars.

IN WITNESS WHEREOF, we have hereunto set our hands this 12th day of December, A. D. 1902.

JOHN L. HOWARD.

JAMES B. SMITH.

JNO. C. WILSON.

JOSEPH L. SCHMITT.

SIDNEY V. SMITH.

[69—5]

(Here follows in due and regular form a notary public's certificate of acknowledgment of the execution of said Articles of Incorporation by the above signers thereof; and a certification by the County Clerk of the City and County of San Francisco that "the foregoing" is "a full, true and correct copy of the original Articles of Incorporation of Western Fuel Company filed in my office on the 12th day of December, A. D. 1902"; and the usual endorsements in due and regular form regarding filing and recording by the Secretary of State of the State of California and the County Clerk of the City and County of San Francisco.) [70—6]

**[Testimony of Hugh Donegan, for the Government.]**

HUGH DONEGAN, a witness called for the United States, and sworn, testified as follows:

Direct Examination by Mr. ROCHE.

I am now, and have been for about twenty years last past, a civil engineer and surveyor and for a number of years have been engaged in the practice of my profession in the City and County of San Francisco, where I now reside.

For some time I have been familiar with the Fol-

(Testimony of Hugh Donegan.)

som Street Bunker or Dock, and about ten days ago I went upon that dock for the purpose of making plans or measurements of the superstructure thereon. On that and subsequent occasions I made measurements of said superstructure, including the coal bunkers.

I have made a plat or diagram of one of the hoppers located on that superstructure.

(A so-called "larger diagram" representing the top of the coal bunkers upon the Folsom Street Dock was here placed in front of the jury. This diagram was eventually marked United States Exhibit Number 2.) The measurements for this diagram of the bunkers were made under my supervision and the diagram itself was drawn or platted in my office and under my supervision. The scale is 10 feet to 1 inch and the diagram is drawn to scale. It is 35 feet from the level of the plank wharf to the top of the rail or track upon which cars are operated on top of the bunkers. The wharf itself is about 7 feet above water level. I ascended the bunkers by stairways or steps located upon the north side of the wharf, but I do not know how many such stairways there are.

The length of the bunkers east to west is approximately 530 feet. The dock itself proceeds in a northeasterly [71—7] direction out into the Bay. The width of the bunkers is 40 feet and 9 inches.

There are three tracks on top of the bunkers which, together with the switches and leads, are located as represented upon the diagram now before



(Testimony of Hugh Donegan.)

the jury (United States Exhibit Number 2).

There are two bunkers which may be designated the inshore bunker and the offshore bunker on the dock. The offshore bunker occupies a little less than the easterly half of the dock reaching back approximately 230 feet in a westerly direction from the east end of said dock. The offshore bunker is divided into twenty compartments or pockets each represented by an arrow upon the diagram (United States Exhibit Number 2). The dip or slant of these pockets is offshore and by the compass in a southeasterly direction. There is also a pocket proceeding in a northeasterly direction indicated by the arrow point. There are also three pockets of the offshore bunker which dip or slant in a northerly direction, these being the pockets for screening. The width of each of these pockets east to west is approximately 10 feet. I did not measure, and do not know, the depth of these pockets. The partitions in the offshore bunkers forming the pockets or compartments reach right up to the top of the bunkers, that is to say, to the bottom of the rail or track which is laid upon the bunkers. That is true of all the pockets of the offshore bunkers.

The inshore bunker has five pockets. It occupies the entire dock for a distance of 530 feet in an easterly direction from the easterly end of the dock, and including the whole of said dock excepting such portion thereof as is occupied by the offshore bunker.

The distance between the westerly end of the off-



(Testimony of Hugh Donegan.)

shore [72—8] and the westerly end of the inshore bunker measures about 288 feet 6 inches. The lengths of the respective pockets or compartments of the inshore bunker, measuring in each case east to west, are as follows: 130 feet for the first, 60 feet for the second, 60 feet for the third, 20 feet for the fourth, and 18 feet and 6 inches for the fifth. These compartments or pockets dip or slant in a northeasterly direction. Immediately underneath the chutes attached to each of these pockets is the level planking of the wharf for the use of wagons.

Referring now to a typical section designated AB upon the diagram of the inshore bunker, I point out six rails, two to each track. AB represents a cross section taken through the whole body of the superstructure from the water level up to the rails supporting the hopper a portion of it is a representation of a compartment of the inshore bunker.

There is a walk or passageway (indicated by coloring on the diagram) about 4 or  $4\frac{1}{2}$  feet wide upon the north side of the top of the bunkers, which walk extends from the easterly to the westerly end of the dock. The distance between that walk and the first track proceeding in a southerly direction is 7 feet, measured from the north rail of the north track. There is no planking, flooring or decking of any kind over the space between the plank walk and the north rail of the north track. The gauge of each of these tracks is 3 feet. There is partial planking between the rails in each one of these tracks,—that is to say, there is at some points a

(Testimony of Hugh Donegan.)

firm spike planking and at other points a movable planking which can be taken out. The space between the north track and the middle track from the south rail of the north track to the north rail of the middle track was open when I visited the docks and not planked at all. That is true of the entire dock extending from the westerly to the easterly end of the dock for a distance of 530 feet, except for a very small space, and the only interruption to the open space there consists of the girders running from one side of the dock to the other. The space between the middle track numbered Track [73—9] 2 and the south track is open for the entire length except where the ties cross the switches. That is to say, except where the leads run from one track to the other. The distance between the south rail of the middle track and the north rail of the south track is four feet center to center of rail and is open except for a foot that you have to take off for the cap. The distance between the two rails of the south track is planked down to a point opposite the end of the screening shed, that is to say, practically to the westerly end of the offshore bunker. It is open from there on proceeding in an easterly direction to the easterly end of the dock.

(It is here conceded by counsel for the Government that, of course the witness refers only to the conditions which he found at the dock and bunkers when he visited them for the purpose of making the measurements for this diagram.)

(Testimony of Hugh Donegan.)

The space between the southerly rail of the south track and the southerly side of that dock was closed or covered by movable planking for part of the distance and open for part of the distance. This space is two feet six inches wide.

There is a little board walk about a foot and four inches wide upon the extreme south side of that dock and running the entire length of the wharf.

The elevation of the post or upright just underneath the letter B in Section AB is 6 feet 5 inches above the track between the rails. This post carries the rail *for the hoppers for the hopper*. That is to say, this particular post carries the south rail. The center post supports the north rail of the hopper track. Between the two rails to which I have just referred two of the three hopper tracks are located and these two tracks are the southerly tracks marked on the large diagram "2" and "3." [74—10]

Referring now to United States Exhibit Number 3, the coal is taken up and dumped into the hopper and then it is loaded into the car. The structure located on said Exhibit 3 immediately above the words "side elevation looking south" represents the hopper looking south. If the hopper were opened it would dump coal into the car below. At the time when I was making the measurements for these diagrams the cars were actually being loaded with coal from the hoppers. The car shown on the diagram is located on the north track.

I remember seeing a scale-house upon the bunkers.

(Testimony of Hugh Donegan.)

It is marked "Office" on Exhibit 3. The elevation of the floor of the office or scale-house above the bunkers is irregular—7 feet 1 inch at one point and 6 feet 5 inches at another point. There is a window in the easterly side of the office. The scales are located within the office. There is a beam some little distance to the south of the office which is shown on the diagram.

I recall some photographs being taken on the day when I first visited the dock to take measurements. (Counsel for the plaintiff here produced certain photographs which were marked by the clerk for identification "United States Exhibits 4, 5, 6 and 7.")

The object marked "A" in Exhibit 3 represents one of the hoppers, and the object marked "Car" was a car which was located on the north track immediately north of the hopper. The structure marked "B" upon Exhibit 3 is a coal chute extending in a northerly direction. There are two coal chutes projecting out from the northerly side of these hoppers. The coal chute marked "B" on Exhibit 3 is immediately over the object designated "Car" in that exhibit. I recall some chutes extending in a northerly direction from the north side of the hopper. It is indicated in the structure marked "B" upon the diagram "Exhibit 3." There are two of these coal chutes projecting from the northerly side of each hopper. The car represented upon that structure marked "B" is in the picture standing upon the northerly track and immediately north of the hopper. [75—11]

(Testimony of Hugh Donegan.)

Referring to the day on which I visited the bunkers with Mr. Roche I recall the existence of hoppers located on the hopper tracks to which I have heretofore referred, and I remember one hopper being located a short distance east of the scale-house. I also recall that photographs were taken on that day of the conditions existing on the bunker at that time.

United States Exhibit Number 4 now shown to me is a photograph that represents the conditions on the bunker as they were on the day when I observed them. The photograph shows a hopper with two of the chutes projecting in a northerly direction and over the northerly track, and that was the first hopper from the scale-house proceeding in the easterly direction toward the easterly end of the dock. (The photograph, United States Exhibit 4, was here formally offered in evidence—no objection by the defense.)

(It was here stipulated by counsel for the plaintiff that when an objection is made and an exception taken, such exception, unless otherwise specified, shall be available to the defendants generally.)

I do not recall upon which date this photograph, United States Exhibit 4, was taken. It was about a week ago last Thursday that I first visited the bunkers to make measurements. I cannot recall what time of day it was that the photographs were taken. The coal chutes represented in the photograph are also represented upon my diagram, United States Exhibit 3, at the point extending out and over what is marked "Car."



(Testimony of Hugh Donegan.)

Elevation B upon United States Exhibit 3 represents a hopper located upon the tracks on which the hoppers are operated and can be operated from one end of the bunker to the [76—12] other, that is, from the westerly end of the dock to the easterly end. Three chutes are connected with each hopper, two on the northerly side and one dropping down underneath. A car, in order to receive coal from the chute underneath the hopper, has to be located upon Track Number 3 as laid down in United States Exhibit Number 2, which is the southerly track.

The coal is carried from the boats, which are located on the south side of the docks, in buckets and is dumped from the buckets into the hoppers. There was a boat discharging on the docks on the day on which I was there with Mr. Roche. As I have testified before, the coal is discharged from the hopper by means of the chutes projecting from the hopper in a northerly direction, but on this particular occasion the coal was being taken from the hopper by the vertical drop. The projection of each one of these chutes from the northerly side of the hopper is about 4 feet 6 inches.

Referring again to the structure marked "A" on diagram "B," I would now say that the object marked "Car," which you say I before testified was located on the northerly track, as a matter of fact represents a car located on the southerly track immediately underneath the chute below the hopper.

(A photograph is here introduced in evidence as United States Exhibit Number 8, it being conceded



(Testimony of Hugh Donegan.)

by the defendants that that photograph correctly represents the bottom of one of these hoppers, and likewise shows the existence of the chutes which descend from the bottom of the hopper. The photograph is offered for no other purpose.)

On the occasion upon which I visited the bunkers I also went into the scale-house. I remember that a photograph was taken of said scale-house. The photograph which has heretofore [77—13] been marked for identification "United States Exhibit Number 5" correctly, accurately and truly represents the location of the scale-house at the time when I was on the bunkers. (The photograph was here introduced in evidence as United States Exhibit Number 5.) The last above-mentioned photograph correctly, truly and accurately represents the condition of a certain beam or girder therein located immediately under what purports to be the scale-house as I found its condition to be on the day when I first visited the bunkers. I measured that beam. That part of the plat heretofore marked "United States Exhibit Number 2," section through CD, scale 1 inch equals 4 feet, represents that beam. The horizontal represents the girder, and its dimensions are, perpendicular 12 inches and horizontal 10 inches; the girder, running in a generally northerly and southerly direction and extending from the south floor of the scale-house to the south side of the dock. There are three tracks located underneath that beam.

I did not get inside the scale-house so cannot say where the actual scales themselves were located.

(Testimony of Hugh Donegan.)

Last Saturday I examined the structure immediately underneath the scale-house and between its floor and the tracks. There are two rods there exposed for a distance of 9 feet which descend from the floor of the scale-house to the floor of the bunker. I do not recall their dimensions.

Referring again to the beam in front of the scale-house, it is a 12 inch beam, but it measured only 10½ inches, because it has been cut out in a rough sort of way. This portion of the beam was in appearance “roughed up,” and did not appear to have been recently made as it was, weatherbeaten, it was rough. Of the three tracks that lead to the scale-house the southerly track is the one located immediately underneath that irregular line or groove in said beam. The beam is the same one that is represented in the photograph, United [78—14] States Exhibit Number 5, now introduced in evidence to show the situation and condition of the beam and the situation generally upon the photograph.

When I visited the Folsom Street dock I noticed two scales located upon the dock. The south track runs over one and the north track over the other. The scales are about opposite the scale-house and are on a level with the floor of the bunkers; that is to say, the tracks run right along upon the top of the two scales.

This Folsom Street dock continues toward the west and behind the scale-house right across the street, by a sort of bridge or tramway. It runs over to a structure on the westerly side of that street.

(Testimony of Hugh Donegan.)

The open space between the three tracks located on diagram, United States Exhibit Number 2, to which I testified a short time ago, leads into the bunkers, so that material dropping between the tracks into the spaces finds its way into the bunkers.

I do not know and did not make an examination for the purpose of ascertaining whether the compartments or pockets either of the inshore or off-shore bunkers were or were not numbered.

Screening sheds were located upon the bunkers at the point indicated by the shading, and, except for the structures already described by me, these sheds were the only structures located upon the dock. The greatest width of each is about 7 feet.

I did not take the elevation of the hoppers or their width from side to side. I simply measured from post to post. The rails upon which the hoppers are operated are supported by timbers or uprights located at intervals of about every 10 feet from the westerly end of the dock to the easterly end of the dock. Said two diagrams were thereupon offered in evidence the larger diagram as "U. S. Exhibit 2" and the smaller diagram as "U. S. Exhibit 3." [79—15]

As soon as Court adjourned yesterday I visited the Folsom Street bunkers again. I found that there are two chutes descending from the bottom of each hopper. Referring to the structure B, United States Exhibit Number 3, the object marked "Coal Chute" is one of these chutes, and the other chute adjoins it. The chute is immediately above the car.

(Testimony of Hugh Donegan.)

The measurement of the beam in front of the scale-house which I gave yesterday as 10x12, should be 6x12.

The distance between the top of the rails and the top of the sides of the car standing on the rails is 5 feet 10 inches. The distance between the top of the car and the heretofore mentioned horizontal beam at that part of the beam where it is not chewed out or worn away is 1 foot 2 inches. I did not examine the cars themselves, nor their interiors, and I do not know what kind of a bottom these cars had.

Cross-examination.

(By Mr. McCUTCHEN.)

The beam or girder which I have heretofore spoken of as extending to the south of the scale-house holds the framework for the office of the scale-house. It supports the scale-house which rests upon that beam or girder and another girder some distance from it. My understanding from observation is that the girders or beams were put there to support the scale-house. The distance between the easterly end of the scale-house shown upon my diagram and which I described yesterday, and the westerly end of the bunker, is about 10 feet 6 or 8 inches, and for that distance the space between the tracks and to either side of the tracks is solidly floored or planked. That is to say, the space for the entire distance from the [70—16] southerly side of the bunker near B to the northerly side of the bunker near C is all planked, to a distance 10 ft. 8 in. easterly of the scale-house.

There is a third rail between the two outer rails of

(Testimony of Hugh Donegan.)

the southerly, the middle and the northerly tracks, respectively, as said tracks are delineated upon my diagram.

I did not see any hoppers discharging coal into cars on the northerly tracks, and I do not know that coal is ever discharged from the hoppers into cars on the northerly tracks. The only loaded cars which I saw on the northerly track at all were those which had been switched onto that track from the middle or the southerly tracks where they had been loaded.

On the day I visited the bunkers the movable boards or planks which I have heretofore spoken of were laid just south of the southerly rail. They were not laid down to the north of the middle rail on the day on which I was there. These boards were bound together with cleats so that when they were dropped they would fill the entire space. They were so covered with coal dust that I could not tell whether they were new boards or planks.

(A photograph is here handed the witness.) This photograph is a correct representation of the bunkers, looking at them from the southerly side. The ship represented on the photograph, the "Ken Kon Maru," was discharging at the dock when I made my measurements. (It is here conceded by counsel for the plaintiff that the photograph may go in evidence as an exhibit without further identification, and it is marked Defendants' Exhibit "A.") When I was on the bunkers I was in a position where I could see the unloading of the aforementioned ship. Three of the hoppers were working and I think,



(Testimony of Hugh Donegan.)

therefore, that the ship must have had three hatches. (Counsel for the defendants here, by consent of [71—17] counsel for the plaintiff marked the hoppers on the photograph "1," "2," "3" and "4," and counsel for plaintiff stipulated that each of the figures does represent one of the four hoppers.)

(Witness is here shown another photograph. It is stipulated by counsel for the plaintiff that this is a photograph of the northerly side of the dock extending in a westerly direction from the westerly end of the dock to the yard of the Western Fuel Company on the opposite side of the street, and that, subject to correction, it is a correct representation of that which appears within it; also stipulated that the numbers "1," "2," "3" and "4" upon the photograph, represent the hoppers. The photograph is introduced in evidence as Defendants' Exhibit "B," counsel for plaintiff reserving the right of redirect examination regarding any object represented in said exhibit.)

(Witness is shown a photograph marked Defendants' Exhibit "C" for identification. Stipulated by counsel for plaintiff, subject to correction, that this photograph represents the westerly side of the scale-house; that the bunker dock heretofore referred to is behind the scale-house and the hopper represented in the photograph. The photograph was here introduced in evidence as defendants' Exhibit "C." Further stipulated by counsel for the plaintiff that the object marked "1" represents a scale-house and shows the westerly side and part of the southerly



(Testimony of Hugh Donegan.)

side of said scale-house in addition to the westerly side of the roof thereof; further stipulated that the structure marked "2" on the photograph represents the upper part of the first hopper.) The object marked "3" on the photograph is a little dynamo or electrical engine that draws the cars. (Stipulated that the window marked "4" in the photograph is a window in the office [72—18] looking south. Counsel for the plaintiff remarks that he wants the jury to understand that that photograph represents the westerly side of the scale-house that faces toward San Francisco; stipulated by counsel for defendants that that is quite true.)

If I stated yesterday that I went into the scale-house I was mistaken or the record is mistaken in that regard. I did not go into the scale-house.

(Another photograph is here shown to the witness.) This photograph correctly represents that portion of the wharf that is shown in it. (Stipulated by counsel for plaintiff that the photograph correctly represents what it purports to represent at a time when the movable or portable planks, to which the witness testified yesterday as lying at the side of the south rail of the south track as between the two tracks had been laid; stipulated also that the figure "1" which is placed to the north of the north side of the hopper represents a portion of a hopper. The photograph is introduced in evidence as Defendants' Exhibit "D.")

I do not remember on any of my visits to the

(Testimony of Hugh Donegan.)

bunkers seeing a car loaded on any other track than than the southerly track.

(Another photograph is here shown to the witness. It is admitted by counsel for plaintiff that this photograph is a representation of the western side of the scale-house looking in an easterly direction with the dock and bunkers behind the scale-house; also that the photograph shows an electrical locomotive and cars upon the southerly and the middle tracks; also that the load in the cars is supposed to be coal. The photograph is introduced in evidence as Defendant-Exhibit "E.") [73—19]

The operator on the cars stood back of the engine.

(Another photograph is here shown to the witness and is marked Defendants' Exhibit "F" for identification.) I find on this photograph the representation of a man's head almost immediately under the girders which have been referred to as supporting the office. The man is between two cars. I did not pay sufficient attention to the situation to be able to say that the man on the cars was always so stationed. Sometimes I saw two men on a train. I do not recall whether I ever saw a single man on a train who was located at any other place than between the two cars. The photograph correctly shows the cars as I saw them on the southerly and the middle track. I could not say whether I saw an operator stationed on the electric locomotive. Sometimes there were two men and I do not know exactly what position they occupied. I could not answer as to what position the

(Testimony of Hugh Donegan.)

man occupied when there was only one man on the train. Sometimes the trains came up to the scales with the locomotive in front, and sometimes with one of the cars in front. I don't recall whether or not when the trains came with one of the cars in front the operator was on the locomotive to the rear of the two cars.

(Another photograph is here shown to the witness and is introduced in evidence as Defendants' Exhibit "G.") This photograph shows the track from a point about underneath the hopper to the easterly end of the bunkers, that is to say, it shows the southerly and the middle tracks, and also a portion of one of the hoppers.

(The witness is here again shown the photograph, Defendants' Exhibit "F," for identification.) This photograph represents one of the hoppers and the northerly track for a [74—20] portion of the distance along the wharf looking to the south or south-east. That is to say, it represents the northerly and the westerly side of the hopper. (It is admitted by the prosecution that there was a man in charge of the train at the time this photograph was taken; it is admitted by the defendants that at the time this photograph was taken there was not a sufficient amount of coal loaded on any of these cars to enable the coal to come in contact with either one of the two girders; also admitted by defendants that the photograph is a representation of the westerly side of the scale-house looking east and that the dock or bunkers, concerning which evidence has been introduced,

(Testimony of Hugh Donegan.)

are located behind the scale-house and to the easterly side thereof. The photograph is here introduced in evidence as Defendants' Exhibit "F." Counsel for the defendants corrects his previous statement that these trains could not be operated unless the man was located between the two cars, asserting now that that was the way in which they were usually rather than necessarily operated.)

(Witness is here shown another photograph.) This photograph correctly represents the two hoppers to the extent that they are shown in the photograph as also the southerly and middle tracks and a portion of the northerly track. (Admitted by the prosecution that the photograph is correct for the time at which it was taken but not conceded that the portable planking is always down at the time that coal is being discharged. The photograph is introduced in evidence as Defendants' Exhibit "H.")

(The witness is here shown another photograph. Admitted by the prosecution with the reservation that the condition in which the temporary planking appears in the photograph [75—21] as not necessarily the condition in which such planking is found when the coal is being discharged, that this photograph correctly represents portions of three hoppers and likewise a portion of the southerly track. Also that the photograph shows a portion of an electric motor and a portion of a car located on the middle track. The photograph is introduced in evidence as Defendants' Exhibit "I.") The wheels of the most westerly hopper shown on this photograph are cor-

(Testimony of Hugh Donegan.)

rectly represented and there are other wheels of the same size on the other side. The rail here shown being the southerly rail of the hopper track, there is a similar rail on the north side. Counsel for the prosecution asked the jury to notice that in each of the last two above-mentioned photographs portions of the temporary planking have been removed. When I was making my measurements on the bunkers the space between the middle track and the south track was open from the westerly line of the westerly screen shed to the easterly line of the offshore bunker, a distance of 230 feet. From the westerly point that I have just described to the westerly end of the bunkers the space between the south and the middle tracks was provided with movable planking. I know that the planking was movable because some times when I was there the planks were taken up while at other times they were down, and at the particular time when I made this observation they were down, but at other times I saw them up.

I have known the Folsom Street wharf and bunkers for about ten years. I never was on them before. I do not know when the bunkers were placed there.

Cross-examination by Mr. DUNNE.

The name of the street from which the Folsom Street [76—22] wharf starts out into the bay is Embarcadero Street. The bunkers are built up above this plank wharf. Then comes a sort of second story on which the dump-car tracks run; then there is still a third story on which the hopper tracks



(Testimony of Hugh Donegan.)

run. There are three dump-car tracks, but only one hopper track. The offshore bunkers are receptacles for coal, and the south side of the wharf where they are located comes right down flush with the water so that you could not drive a wagon on the other side of it. When ships or barges want coal they come to these offshore bunkers. If a coal man from up town wants coal he goes to the inshore bunkers and that is why there is a plank walk to the north of the inshore bunkers. These, then, are the two classes of bunkers,—offshore and inshore, which figure in the Folsom Street bunkers. When a ship wants to discharge coal she draws up on the southerly line of the wharf. The coal is taken out of the hold of the ship, being brought up through the hatch in a bucket and dumped into a hopper which is nothing more nor less than a big coal-box or coal-scuttle on wheels. This hopper or coal-box moves up and down on wheels on the third story of the bunkers so that it can be accommodated to the relation of a given hatch of a ship. From the coal-scuttle or hopper the coal is emptied into the dump-car below, the coal passing from the hopper through the chutes. So far as my observations went the two chutes underneath the hoppers were used and never the side chutes. So far as my observation went the dump-car was always on the south track when it received coal. A car standing on the middle track could not possibly receive coal through the bottom chutes of the hoppers. The middle track is used for switching purposes. I never saw any boards or planks



(Testimony of Hugh Donegan.)

covering the space between the off track and the middle track, from the extreme westerly end of the bunkers [77—23] down to the scale-house. The place where I did see the planks down was that space south of the southerly track from the scale-house, approximately to the offshore bunkers. I do not think I ever saw a hopper doing business opposite the offshore bunkers. So far as I observed, the discharging of coal from the hoppers is all to the west of the offshore bunkers. By the girder which has been heretofore called to my attention I mean a thick timber 6x12 which is on the third story. The scale-house rests on that girder timber or cross-beam. There are two such girders. The first girder reached by the car proceeding down the track westerly is the one which Mr. Roche yesterday described as having been chewed off. Its depth is 12 inches, and it was chewed off 11½ inches.

Redirect Examination by Mr. ROCHE.

During the last ten days I have visited the bunkers five times for the purpose of taking measurements, and the first occasion was that on which the photographs heretofore introduced in evidence by the prosecution were taken. Referring to the space shown in United States Exhibit Number 1 between the middle track and the south track from the westerly end of the offshore bunker to a point about 10 or 15 feet east of the scales, I will say that the space was open the day I was there. I won't say the space was entirely open, but it was here and there planked,

(Testimony of Hugh Donegan.)

a piece perhaps 3 or 4 feet long. I didn't observe its condition except on that particular day. Mr. Tidwell called my attention to it then. On that date the space was open.

Q. Was the space entirely open, or was it closed at intervals by the use of the temporary planking or decking? A. There was occasional planks.

This is the space to which Mr. Dunne directed my attention on cross-examination.

Referring to the space to which my attention was directed yesterday and this morning, indicated upon United States Exhibit Number 1, to the south of the south track and between the south track and the south side of the bunker and extending westerly [78—24] from the west end of the offshore bunker to a position about 10 or 15 feet east of the scales, I would say that said space was planked but that some of the planks were partially up and resting on the coal. I found the space between the two rails of the south track and the center track planked.

It is not a fact that the entire dock particularly at its western end is enclosed. I do not recall a rail fence of any kind extending practically across the dock. I have no recollection upon that subject at all.

Referring to Defendants' Exhibit "B" and refreshing my memory by looking at it, I would say that the approach to the dock upon the first story was not enclosed at any time that I passed through it. There were no obstructions to the westerly approach

(Testimony of Hugh Donegan.)

of the first floor of the dock. Teams were constantly coming in and out through there and they did not pass through a gate. I reached the upper part of the superstructure by means of a stairway located on the north side of the western approach to the dock. I recognize that stairway on Defendants' Exhibit "B" (marked by counsel "A"). The stairway leads to a door which is about flush with the floor of the bunker. The door was closed when I visited the bunkers, but not locked. I do not recall whether the door was locked on the occasion when we first visited the bunkers or not. I do have a recollection of a mode of access to the top of those bunkers other than by means of that stairway. I refer to a stairway toward the easterly end of the dock. It is in the vicinity of the screening shed. The bottom of that stairway is surrounded by a wooden fence that was open when I went through, and I did not pass through a doorway or gateway. From there I passed onto the floor of the dock underneath [79—25] the bunkers. The only two methods of reaching the upper part of the bunkers that I know of are the two which I have just mentioned. I saw no citizens of San Francisco on top of the bunker examining it at any time.

(Pointing out on Defendants' Exhibit "F" two rods, one upon either side of the north upright which apparently supports the scale-house, the witness here said that these two rods were the rods connecting with the beams in the scale-house.) I did not notice a covering of any kind upon either of these rods.

(Testimony of Hugh Donegan.)

Upon one or more of these occasions when I visited the bunkers for the purpose of making measurements, I noticed some of the temporary planking located between the off or south tracks, and the extreme south side of the bunker upon and leaning against the side of the bunker.

There is a sort of solid wall extending along the south side of the dock with an elevation of perhaps five feet. I recognize this wall in Defendants' Exhibit "H" now shown to me. The wall is immediately below the extreme south side of each of the hoppers and is in fact supported by the uprights or beams which likewise support upon their top the south rail upon which the hoppers are operated.

I observe upon the photograph marked Defendants' Exhibit "H" that some of the portable planking has been taken up and is leaning against the side of the last described wall, but when I was actually down there on the wharf the planking was pretty much down and only partially up. I did not testify a few minutes ago that on one or more of the occasions when I was on the dock I saw portions of the decking between the south track and the south wall open and leaning against the coal. What I said was that they were partially up leaning on top of chunks of coal, that is to say, the chunks were underneath and prevented the planks from dropping into place. I do not know how the chunks of coal got under this portable planking. I think coal was being discharged at the docks on almost every occasion when I visited said docks. I paid no particular attention

(Testimony of Hugh Donegan.)

[80—26] to the method in which they were discharging coal, because I was busy making measurements and keeping out of the way of the third rail. The two chutes beneath the coal-hoppers through which the coal passes into the dump-cars all project in a southerly direction, and that is the reason why it would be impossible to load any one of those cars upon any track except the southerly track.

Recross-examination by Mr. McCUTCHEN.

In addition to the two ways of gaining access to the bunkers which I have heretofore mentioned on redirect examination, there is another means of approach, namely, by the bridge which crosses the Embarcadero, once you have got on the bridge, of course.

Further Redirect Examination by Mr. ROCHE.

This bridge leads into some yard across the street. (Counsel for defendants here ask counsel for prosecution whether they are attempting to show that the bunkers of the Western Fuel Company were closed to representatives of the Treasury Department; to which the prosecution answers that they do not know and that they are simply endeavoring to show that people in general were not permitted to go upon and never see the bunkers.) [81—27]

**[Testimony of Thomas H. Selvage, for the Government.]**

THOMAS H. SELVAGE, a witness called for the United States and sworn, testified as follows:

Direct Examination by Mr. ROCHE.

I am and for about two years last past have been



(Testimony of Thomas H. Selvage.)

an assistant United States Attorney, and, during the incumbency of Mr. McNab as United States Attorney, had occasion to participate to some extent in the preparation of this case.

I am now and have been during all of the time of the investigation on this case familiar with the Folsom Street dock or bunkers of the Western Fuel Company. I recall visiting these bunkers three times. On one of these occasions coal was being discharged from one of the boats lying to the south of the dock. Upon one of these occasions photographs were taken within my observation and under my direction of different parts of the dock.

(A photograph marked "United States Exhibit Number 9" for identification was here shown to the witness.) That photograph represents the dock or coal bunkers of the Western Fuel Company taken from the southerly side and looking in a northeasterly direction so as to include the south side of the dock. No boat was being discharged when this photograph was taken, but the photograph shows the side of the dock at which a boat about to be discharged would be located. A barge was swinging into place at the time. The photograph correctly, truly and accurately represents that side of the dock as it appeared to my observation at the time when the photograph was taken. [82—28]

(Another photograph marked "United States Exhibit Number 10," for identification was here shown to the witness.) That photograph was taken at the same time as the last mentioned photograph. It



(Testimony of Thomas H. Selvage.)

represents the same side of the dock and it shows the barge to which I referred a moment ago. The photograph truly, correctly and accurately represents the situation as it appeared to my observation at the time the photograph was taken. (The photograph is here introduced in evidence as "United States Exhibit Number 10," and the prior photograph is likewise introduced in evidence as "United States Exhibit Number 9.")

(A photograph marked "United States Exhibit Number 14" for identification is here shown to the witness.) This photograph represents the north side of the coal-bunkers looking east. They were not discharging coal at the time on that track.

I recall the fact that the two photographs introduced above in evidence as "United States Exhibits Numbers 9 and 10" disclose no collier or other boat being discharged upon the south side of the dock. I did not see any coal being discharged there at that time.

The photograph "United States Exhibit Number 14" for identification correctly, truly and accurately represents what it purports to represent as observed by me. The camera in the case of this photograph was spotted upon the platform immediately in front of it and beside the scale-house.

In order to reach the entrance to the scale-house you have to ascend some 7 or 8 stairs which lead from the deck on the top of the bunker and close to the scales office up to the scale-house. [83—29]

(Another photograph marked "United States Ex-

(Testimony of Thomas H. Selvage.)

hibit Number 15" for identification is here shown the witness.) This photograph was taken at the same time as the other and nearly at the same place as the last aforementioned photograph. It represents the north track and the north side of the hoppers and represents what it purports to represent accurately, correctly and truly.

(Another photograph marked "United States Exhibit Number 16" for identification, is here shown to the witness.) This photograph was taken at the same time as the others. It represents the north side of the coal-bunkers and the track looking west and shows all the tracks and the four hoppers, there having been four hoppers located upon this superstructure on the day when the photographs were taken. I never have seen more than four hoppers. The hoppers travel upon tracks elevated above the floor of the bunkers and can be stopped at any desired point over the bunkers. They run from east to west and occupy the southerly portion of the dock or bunker. This last mentioned photograph correctly, truly and accurately represents what it purports to represent as observed by me.

I do not recall any temporary flooring or decking over the inshore bunker between the middle track and the south track until you get pretty well west over said bunker. I was then familiar and am now familiar with that part of the dock located between the south rail of the south track and the extreme south side of the dock, and the condition of that part of the dock when the photographs were taken was

(Testimony of Thomas H. Selvage.)

just the same as is shown in this photograph "United States Exhibit Number 16" for identification, that is, there was no covering at all over the offshore bunkers and there were some planks resting up [84—30] against the wall on the inshore bunkers. Some of the bunkers were not covered at all and some of the planks over the bunkers that were covered were elevated somewhat upon the coal beneath them.

(A photograph marked "United States Exhibit Number 17" for identification was here shown the witness.) Portions of the portable flooring or decking were resting up against the extreme south side of the dock at the time when the photograph was taken, as is shown in this photograph.

(Another photograph marked "United States Exhibit Number 18" for identification was shown to the witness.)

This photograph was taken at the same time as the others heretofore mentioned, and correctly, truly and accurately represents what it purports to represent and which came within my observation at the time it was taken. This photograph was taken from a platform or bumper at the east end of the bunkers. The camera was located, when the photograph was made, so as to take in compartment number 22. This photograph likewise correctly represents the condition in which the wharf was at that time or in which the bunkers were at that time and just how they were exposed. The photograph was undoubtedly taken on the south side of the bunkers at the east side and looking west. (The photograph is here introduced

(Testimony of Thomas H. Selvage.)

in evidence as "United States Exhibit Number 18.")

(Another photograph marked "United States Exhibit Number 19" for identification was here shown the witness.) This photograph was taken at the same time as the others and represents that portion of the bunkers just back of or in an easterly direction from the scales looking to the east. The hopper first shown in the photograph is the first hopper. It was only a short distance east from the scales. The photograph correctly, truly and [85—31] accurately represents the situation it purports to disclose. The flooring provided for the space, appearing in the photograph between the south rail of the south track and the extreme south side of the bunker or dock, was mostly laid up against the wall. (The photograph was here introduced in evidence as "United States Exhibit Number 19." United States Exhibits Numbers 14, 15 and 16, heretofore marked for identification were at this time also introduced in evidence as United States Exhibits of the corresponding numbers.)

I am familiar with the scale-house located upon the dock immediately above the scales connected with the north and south tracks respectively. I have been inside said scale-house. We took two photographs of the interior of the scale-house. There were two scales beams therein. Those beams were located on the west side of the house. I was not in the scale-house while the coal was being weighed. The scale beams are up against the side of the scale-house as I remember it, so that there is no space in which a

(Testimony of Thomas H. Selvage.)

person can locate himself between the scales beams and said west side of the house and take weights, looking in an easterly direction down the tracks or toward the hoppers; that is to say, the person taking the weights must face around with his back immediately toward the dock and hoppers and toward the place where the coal is being loaded into the cars.

(The attention of the witness is here again called to photograph marked "United States Exhibit Number 12" for identification.) That photograph was taken at the same time as the others heretofore referred to. It represents the interior of the scale-house and the beams. The camera was facing toward the southwest. A curtain was drawn over the window immediately behind and west of the scale-house.  
[86—32]

(The attention of the witness was here again directed to the photograph, United States Exhibit Number 13, for identification.) This photograph represents the interior of the scale-house and shows the scales beams and a window immediately to the west of the beams, with the curtain up. Each of the last two above mentioned photographs correctly, truly and accurately represent what they purport to represent. (Said photographs are here introduced in evidence as United States Exhibits Numbers 12 and 13.)

There is a window immediately to the south of the door on the east side of the scale-house and facing the dock and coal hoppers. I recall looking out of that window to ascertain whether one could see the



(Testimony of Thomas H. Selvage.)

scale platform from the scales-room, and I could not see it. A weigher in the scale-house facing the east instead of the west and looking through the easterly window would not be able to see beyond the first hopper. I could not see the track beneath the first hopper. I do not recall seeing any cars stationed at any time under the first hopper while I was in the scale-house. It would not be possible for a person standing in the scale-house and looking in an easterly direction to see the mouth of either one of the two chutes emerging from the bottom of the first coal-hopper, or to see the coal being dropped through the mouth of either of those chutes into a car beneath said first hopper, or to see what was being done under any of the other three hoppers.

(A photograph was here introduced in evidence as "United States Exhibit Number 20" for the purpose of showing that you could not see underneath the hopper at the time the photograph was taken. Counsel for the defendants pointed out, however, that the photograph was very imperfect. It was conceded [87—33] by counsel for the defendants that the black line running down the center of the photograph represents a part of the frame of the window.)

I did not see any persons on the bunkers examining them out of motives of curiosity or otherwise, except Mr. Tidwell and myself and the photographer. Mr. Mayer, the weigher, interfered with us in wandering freely over the bunkers. We gained access to the upper part of the bunkers by going up



(Testimony of Thomas H. Selvage.)

a stairway on the outside. The gate at the top of the stairway was not locked. I do not recall any signs indicating "no admittance."

Cross-examination by Mr. McCUTCHEN.

I first visited the bunkers, I think in May last, about two months after the first indictment was found; the next visit was two weeks later; and the third visit was later still. All the visits were within two or three weeks of each other. Mr. Tidwell and, I think, Customs Agent Smith accompanied me on the first visit. Mr. Tidwell and Photographer Perry accompanied me on the second visit. Mr. Tidwell and another officer, whose name I do not recall now, accompanied me on the third visit. I stayed about the place probably three-quarters of an hour on the first visit, and during that visit simply looked about to see the bunkers and to observe their general construction. No ship was unloading there at the time. There was a ship unloading, however, on the occasion of my last visit. The photograph, United States Exhibit Number 19, was taken in the latter part of May or the first of June. I do not recall any ship unloading at that time though they were handling coal. I do not recall observing the particular spaces between the southerly and middle tracks excepting on my visit when the photographs were taken and, therefore, cannot say whether on any of my visits [88—34] other than that visit on which I found those spaces uncovered, said spaces were covered. I was once at the bunkers when a ship was unloading. I went there to see the

(Testimony of Thomas H. Selvage.)

ship unloading and I remained on the dock most of the time. I did not notice whether the boards were in place. In answer to the question whether I am certain that I was ever upon the bunkers when a ship was being unloaded and those boards were not in place, I would say that I do not recall looking particularly at the condition of the flooring when I went there and examined the ship unloading. I went there to the bunkers with a treasury agent. Answering the question whether it does not occur to me that as a representative of the Government I would not call attention to the fact that those boards were out of place when a ship was unloading if they had been out of place, I would say that I was then particularly concerned with the ship and not with the condition of the bunkers. At the time I took these photographs I was examining the particular place and I recall the exact condition of each of the tracks. I was not there to get evidence to be used in the trial of this case, but I was there acquainting myself with the situation because I thought I would be taking part in the prosecution of this case. I was accompanied on all of my visits by Mr. Tidwell. In answer to the question whether I think it was within the possibilities that those boards could have been out of place while the ship was unloading and I not have called attention to it or have seen it, I will say that I cannot tell positively whether I did or not observe or call attention to such a situation if it existed. I think it very possible that I did observe it at the time,—that is to say, I think it possible I

(Testimony of Thomas H. Selvage.)

did observe whether or not the boards were out of place while the ship was unloading. My understanding was that these boards were intended to be used to cover different points at different times, since, according to my observation, [89—35] there were not boards enough to cover all the space at once. I refer now to that portion of the bunker occupied by the hoppers at the time my photographs were taken, and to the space between the southerly track and the middle track and between the southerly track and the bulkhead. I think there were probably boards enough to cover two-thirds of the space,—that is to say, the space between the two railroads and the southerly road and the bulkhead. I am referring, of course, to the space over the inshore bunkers because there were no coverings whatsoever for the offshore bunkers. Some of the boards were leaning up against the bulkhead and some of them were lying upon the spaces, partly covered—that is, the space would be partly covered but not altogether; but there were not sufficient planks there to cover all of the spaces. I do not know whether there were additional planks that I could not see. I am positive that there were not boards enough to cover all the spaces under all four hoppers. I did not count the boards. But I could see all the boards that were there and there were spaces still uncovered and some of them were leaning against the walls, which, if they had been turned down, they would have covered certain spaces, but there were not sufficient boards to cover the balance of the spaces. I

(Testimony of Thomas H. Selvage.)

had no difficulty, however, in seeing that there were not boards enough to cover the space between all four hoppers. I took a flashlight picture of that. (Mr. Roche here remarks that this is United States Exhibit Number 19 in evidence.)

Whether there were any Government weighers on the bunkers when the ship was unloading I cannot say because I paid no attention to the weighers. I did not notice whether there were any Government Inspectors upon the wharf at the time but there may have been for aught I know. I do not recall going into the scale-house on my visit to the dock on the occasion when a ship was discharging. I entered the scale-house a number of times on the occasion when we took the photographs,—perhaps half a dozen times on that day. This was all within a short period of time because I was directing the photographer what to do and had to go in and out. On the day on which the photographs were taken I did not look out of the south window of the scale-house in an effort to see the south track. From the position the weighers [90—36] would occupy I was unable to see either the platforms of the scales or the chutes beneath the hopper. I could see a very short distance on the track looking easterly. The weigher could not get that view without getting up and changing his position. Having gotten up and looking out through the south window, he could see a portion of the platform upon which the train rested at the time it would be weighed.

(The photograph heretofore marked Defendants'

(Testimony of Thomas H. Selvage.)

Exhibit "C" was here shown to the witness and the witness is asked whether after looking at this photograph he would now say that there would be any difficulty in seeing the whole of the southerly track to the south of the scale-house, the observer being stationed at the south window of the scale-house.) That would depend on whether there is anything in the way. However, if one stood close to the window he could see that portion of the track and the platform occupied by the train at the time the coal is weighed. If you stood up where the chairs were, where the weigher is situated, you could not see those objects. The dimensions of the scale-house are approximately 8 feet north and south and 7 feet east and west. The chair in which the weigher sits is quite a little distance from the south window. The scales are more to the north side than to the south side. Even a small man could reach the south window from the chair by one step. Having reached the window he could see a portion of the cars on the platform. I am not quite clear whether he would look right down on top of the ore train. I remember that my view at the time was interrupted, but not knowing that I was going to be a witness in this case I did not pay particular attention to the nature of the interruption. Whether the weigher could see underneath the hopper would depend very much on the distance of the hopper from the scale-house. I could not see under the hopper when I was there and, of course, I could not see through the hopper. I do not believe [91—37] the weigher could see the chute under the



(Testimony of Thomas H. Selvage.)

hopper if the hopper were 100 feet from the scale-house. The weigher would be about on the same level with the chute, and, in order to see the coal emerging from the chute into the train, I think he would have to lie down flat on the platform. That is the only way that I know of that he could observe the loading operation.

I never was on the bunkers before the visits that have been referred to by me in my testimony here. I wish to add what I omitted to state before, that Mr. Roche and Mr. Sullivan were with me on the occasion of my last visit. That was the third visit.

When I went down to the bunkers, Mr. Mayer asked me what I wanted there. I told him that I was an assistant United States Attorney and that Mr. Tidwell was a customs officer and that we were going to take photographs of the top of the bunkers. He told me we could not do it. I told him I was there for that purpose, that I was going to do it, and I did do it. He asked me to wait until Mr. Mills came and I told him I would not wait for anybody. I had never met Mr. Mayer before. I just simply told him who I was. I knew there were third rails on that platform. It was the second visit that he spoke to me. I never had any difficulty in getting access there at all.

Redirect Examination by Mr. ROCHE.

Mr. Mayer did not state that the reason why he objected to Mr. Tidwell and myself going onto the bunkers was because there was a third rail there. I saw no United States Inspectors or Customs Officials

(Testimony of Thomas H. Selvage.)

upon the bunkers nor anyone except myself, Mr. Tidwell and the rest of my party. [92—38]

Recross-examination by Mr. DUNNE.

I paid special attention to the temporary planking on that visit when we took the photographs. I observed especially where the planking was bestowed and where it was not. I wanted to see whether or not there was planking enough to cover the open spaces and while I did not count the planks or anything of that kind, I simply looked at them and saw there were not enough planks there to cover the open spaces. I did not give this matter of the temporary planking the same special attention on the occasion when I went down there and found a ship discharging. When Mr. Mayer interrupted me on the occasion of my visit to the bunkers he said I would have to get permission from Mr. Mills. Mr. Mills was the superintendent.

**[Testimony of C. C. Dickson, for the Government.]**

C. C. DICKSON, a witness called for the United States, and sworn, testified as follows:

Direct Examination by Mr. ROCHE.

I live and have lived in San Francisco since 1906, and am and have been since 1910 in the employ of the Pacific Mail Steamship Company as clerk in the office of the Vice-president, Mr. R. P. Schwerin. Mr. Schwerin is also the General Manager of the Pacific Mail Steamship Company. I have been more or less familiar with the various employees of the Pacific Mail Steamship Company and know some of

(Testimony of C. C. Dickson.)

their names. I am now and since my employment with said company have been familiar with the various steamships or steamboats owned and controlled by the company and plying between San Francisco and foreign ports. (Admitted by the defendants that the Pacific Mail [93—39] Steamship Company owned the steamship “Manchuria.”) The “Manchuria” plies between San Francisco and Hongkong-Victoria. The same is true of the steamship “China” which plies between San Francisco and Hongkong-Victoria. The steamship “Siberia” and “Corea” are similarly owned by the Pacific Mail Steamship Company and ply between the same aforementioned ports. The vessels named have been plying between said ports during the entire time of my employment with the Pacific Mail Steamship Company. The Steamship “Persia” is operated by the Pacific Mail Steamship Company under agency arrangements, and, during substantially the entire time of such operation has plied between San Francisco and Hongkong-Victoria. The Steamship “Mongolia” is operated by the aforesaid company between the same ports. So, also, the Steamship “Nile” under an agency agreement. The Steamship “Pennsylvania” is operated by the Pacific Mail Steamship Company between San Francisco and Balboa Canal Zone. That is also true of the Steamships “San Juan,” “Aztec,” “San Jose,” “City of Sidney,” “Newport,” and “Peru.” The vessels aforementioned have plied between San Francisco and the other named ports continuously during the years of

(Testimony of C. C. Dickson.)

my employment with the Pacific Mail Steamship Company, with the qualifications already testified to by me. I do not know whether or not we have an employee by the name of Captain Anderson. We do not have an employee by the name of Hoxhurst or Haxhurst. We did have a steamship named "Asia" but she was lost in 1910. I have no present knowledge as to the names of our employees upon that steamer. I do not recall whether J. W. Hoxhurst was an engineer or an official upon that boat. We have not, so far as I know, an employee by the name of P. H. McCarthy or [94—40] P. McCarthy. I am familiar with the names of our employees. We have not, to my knowledge, a Captain Wilson in our employ. In a general way, I have an acquaintance with the names of the employees of the Pacific Mail Steamship Company from 1906 to 1910. I am not in all instances in a position to say whether the parties heretofore mentioned were or were not employees of the Pacific Mail Steamship Company between 1906 and 1910. I have not sufficient information on the subject to answer. I do not know who was the chief weigher of the company. I do not know a man named W. S. Park. We do have an employee named Park, but I do not know his initials. I do not know in what capacity he is employed but he works at the dock. I do not know whether he is chief weigher. The name of the Marine Superintendent is William Chisholm, and he has held that office since I came into the employ of the company as above stated. I cannot say definitely whether he was prior thereto

(Testimony of C. C. Dickson.)

one of the chief engineers. I do not know whether a man named Allen was ever a chief engineer on the Steamship "China." I should say that no one in the employ of the Pacific Mail Steamship Company could tell you the names of all of the employees. Doubtless there is some official more familiar with their names than I am. I don't know whether the Assistant Treasurer would know or not. The name of the Assistant Treasurer is W. B. Wallock, and he held that office when I entered the service of the company—for how long before that I cannot say. (Admitted by counsel for the defendants that the Pacific Mail Steamship Company is a corporation organized and existing and doing business under and by virtue of the laws of the State of New York, and that it has been such corporation ever since January 1, 1904, and on that date). [95—41]

**[Testimony of David C. Norcross, for the  
Government.]**

DAVID C. NORCROSS, a witness called for the United States, and sworn, testified as follows:

Direct Examination by Mr. ROCHE.

I have resided in San Francisco about 18 years and have been Secretary of the Western Fuel Company since the first meeting of the board of directors after the incorporation of the company, at which meeting I was elected to said office. The Western Fuel Company at that time had its office at 318 California Street, now at 430 California Street. The former office was occupied until the conflagration in San Francisco, and the latter office has been used



(Testimony of David C. Norcross.)

since August 1907. I have been more or less familiar with the Folsom Street dock or bunkers since 1906. The Western Fuel Company first took possession of said dock and bunkers in July, 1904. Since I became Secretary the company has been in possession of the following docks in San Francisco: Mission Street dock, Howard Street Dock No. 2, Folsom Street dock, and for a portion of the time of the Vallejo Street dock. The company first used Mission Street Dock Number 2 in the receiving and discharging of coal, going into possession of said dock on January 1, 1903. The company continued to use that dock until some time in 1910 or 1911 when it was taken down. There were bunkers there. The company occupied the south side of the wharf as well as the bunkers. The next wharf or dock on which the company undertook to do business was Folsom Street. I am not quite certain when we first went into possession of the Howard Street dock, but think it was in 1904, or a little before. There were bunkers already located on that wharf. And after the Western Fuel Company rented the wharf from the State Board of [96—42] Harbor Commissioners it rented and used the bunkers. I think, though I am not certain, that we first went into possession of the Vallejo Street wharf some time in 1911.

The business of the Western Fuel Company consists, among other things, in importing, buying and selling coal, including the importation of coal from foreign countries. The company owns coal mines at Nanaimo, to which it acquired title, I think, at the

(Testimony of David C. Norcross.)

time of its incorporation. Those are the only mines owned by the company in a foreign country. The business of the company, among other things, has been to mine coal at Nanaimo and to import it to the United States via port San Francisco, but we did not import coal into other places—we have sold it at the mine for shipment to such other places. All of the coal that was mined at Nanaimo and brought into the United States at ports other than San Francisco was sold at the mine or on the boat, with the exception of some cases where we sold the coal to deliver, San Diego being an instance of that, and that was regular annual business. I would say roughly that 60 or 65 per cent of the foreign coal imported by us into San Francisco is discharged at the Folsom Street dock or bunkers. The remaining portion of such foreign coal is discharged at Oakland, at Mission Street wharf and at Vallejo Street. Not very much coal has been discharged at Vallejo or Mission Street, however, most of the coal not discharged at Folsom Street being discharged in Oakland. We gave up the Mission Street wharf about two years ago when the bunkers were dismantled. As far as the Vallejo Street wharf is concerned we are still operating it, but I cannot say whether it is used almost exclusively for local coal or not.

The directors of the Western Fuel Company at the time when I was elected secretary and from the date of the incorporation [97—43] were John L. Howard, James B. Smith, Joseph L. Schmitt, J. C. Wilson and Sidney V. Smith. The official designa-

(Testimony of David C. Norcross.)

tion of the defendant John L. Howard was President, of the defendant James B. Smith, Vice-president, of the defendant Joseph L. Schmitt, Director (and he was not Treasurer), of Sidney V. Smith, Director, and of J. C. Wilson, Director. They had no treasurer at that time. The First National Bank was custodian of the funds. I was Secretary.

I have twice visited the company's mines at Nanaimo—first in February or March, 1904, when I remained about a week and visited various parts of the mine, though I did not inspect or go over the entire system because I was more interested in the office than anything else, and just looked casually at the rest of the concern. I examined the books and paid some attention to the properties generally. I paid no particular attention to the weighing and shipping of coal more than to see it coming up out of the mine, passing over the screens, and being loaded into the cars and weighed on the track scales. Most of the coal imported into San Francisco from Nanaimo is clean house coal. The dock is not over a quarter of a mile away from the place where the coal is weighed.

There is a set of bunkers on the dock. The coal having been taken from the mine is placed in cars which are propelled along a railroad track to a scale-house; thence from the scale-house over the line of railway to the coal-bunkers on the dock; thence from the bunkers to the ship or collier about to be laden. Whether or not the tare weight was marked on the side of the cars I do not know. They could not very well get the net weight without weighing the coal.

(Testimony of David C. Norcross.)

While I was at the mine I saw the coal pass onto the scales. I never was inside of the scale-house, however. I did not look to see whether anybody was at the scales inside the scale-house when the coal was run on the scales. I presume there might have been someone in there; they would not be passing cars over. The cars [98—44] were very small, having a capacity of 5 or 6 tons. I could not say whether they weighed the cars one at a time or more than one at a time—I saw the operations merely incidentally as I was passing by. I saw that is what was going on down there, they were evidently weighing cars. On the occasion of my first visit there was no ship at the dock and, therefore, I could not say whether in each instance the coal was first discharged into bunkers and from there into the ship, or whether the coal was sometimes discharged directly from the cars to the ship. When I was there the cars were dumped into the bunkers. I do not know whether the bunkers were pocketed.

I next visited Nanaimo in 1911. I was there two days loafing most of the time. It was simply a visit and not a business trip. I do not remember looking at the scale-house, and I did not see them weighing coal as I was passing by. I do not recall observing the operations as the coal was brought from the mine to the scales and thence to the bunkers. We had some larger cars at this time than those which were there before. I think the capacity of these cars would be about 15 tons. I don't know whether the tare weight was printed on the side of the car. That

(Testimony of David C. Norcross.)

is the last time that I visited the mine. I did not examine the time books relating to the weights kept of coal and I have never seen those books. Thomas Russell was then in charge of the mine. The resident agent now is Thomas R. Stockett. I think he has been there since 1904. I am not sure. Thomas Russell immediately preceded him. Russell was superintendent of the mine. Mr. Stockett is manager. He receives his salary from the Western Fuel Company. He is also known as the resident agent and has been during the years to which I have referred. Whether a document was ever executed in pursuance of a resolution of the board of directors relating to Mr. Stockett and sent to him [99—45] or to the American Consular Agent at Nanaimo, I do not know but I will look among our records to see if there is such a document. (Admitted by the defendants that said Stockett has been the duly appointed resident agent for the Western Fuel Company at Nanaimo and that, subject to correction, he has held that office from 1904 to date. Admitted also, subject to correction, that his predecessor was Thomas Russell.)

There were bunkers on the Folsom Street dock in San Francisco when we went into possession in July, 1904, and these bunkers had been occupied by the corporation that preceded the Western Fuel Company on that wharf. I do not think I have been on the superstructure of the Folsom Street dock more than three or four times during all the period that I have been Secretary of the Western Fuel Company. On those occasions I just casually looked over the



(Testimony of David C. Norcross.)

superstructure. I know where the offshore and in-shore bunkers are situated and that the offshore bunker is toward the easterly end of the dock.

I have had custody of the books of the Western Fuel Company from the time of my appointment as secretary to the present date, and have supervision over the same. I am more or less familiar with the books, records and documents kept by the company. I have heard that the compartments of the offshore bunker are numbered but I do not know that to be a fact and I have never seen it set down in any of the records of the company. No records that I have refer to the pockets by number. I do not know anything about the character of the partitions existing between the pockets, or about their relative height. I have never paid any attention to that matter. I do not know where the balance sheet for the month of April, 1906, for which you have heretofore asked me, is. I thought it was among the papers that were brought up here. [100—46]

John L. Howard is and has been since the incorporation of the Western Fuel Company the president of said company. I am not related to him.

James B. Smith is vice-president and is a very active vice-president. He is the manager of the business in California, has full charge of the bunkers, the employees here and the selling of the coal here. He has complete charge of the entire business here and the employment and discharge of the help. He has charge, of course, of the receipt of the coal at this port. He has foremen and superintendents

(Testimony of David C. Norcross.)

under him to attend to the details. He spends practically all of his time during working hours attending to the business of the Western Fuel Company. I believe that he visits the various properties of the company in San Francisco as the exigencies of the case require. I have not actually seen him upon the properties since 1907. He examines some of the records in the office of the company. I know he sees the monthly sheet and the reports and bills, but I could not say how frequently. When I say "monthly sheets," I am not referring to the sheets showing the receipt and sale of coal. I am referring to the balance sheet and the earning sheet. I mean reports that are submitted each month or about every month at the meetings of the board of directors. Mr. Smith by examination of the records of the company keeps himself in touch with the doings of the company.

President Howard's principal duties are in connection with the mines in the north which he visits two or three times a year, remaining from one to three weeks at a time. When not at the mine he is located in the office of the Western Fuel Company. He has very little to do with the company outside of his connection with the mines from which he gets reports—he receives letters from and writes letters to the mine. When down here he attends more to outside interests than he does to the Western Fuel Company. He presides at the meetings of the board of directors, of which he is president. The defendant Howard, familiarized himself from time to time with the monthly and annual statements. I have seen him examine,

(Testimony of David C. Norcross.)

among other things, the monthly statements to which I referred a few moments ago, containing a general summary of the monthly business of the corporation.

The sheet which is now shown me entitled: "Western Fuel Company, summary of receipts, sales and profits, San Francisco Depot, coal account, dated April 30, 1906," is not one of the sheets which the president of the company examines. The sheets which he does examine are the general balance sheet and earning and expense statements. These reports were kept by the bookkeeper and myself [101—47] and prepared by the former whose name is Martin.

**[Testimony of Hugh Edwards, for the Government.]**

HUGH EDWARDS, a witness called for the United States and sworn, testified as follows:

Direct Examination by Mr. ROCHE.

I am now and have been for 6 years a United States Customs Inspector at Seattle. I visited the mines at Nanaimo in September, 1907, in my official capacity. I was there a little over two days engaged in weighing coal at the scale-house from 7 o'clock in the morning, and all the time that I stayed there both day and night for two days and a night that I was there. I had no time to visit the mine itself. Coal was brought to the scale-house on small cars of 5 or 6 tons capacity. The bunkers were nearly half a mile from the scale-house and are right on the dock. The coal goes from the scale-house to the bunkers on cars. When I got there there was a boat or barge being loaded with coal. I went down to the dock to get my meals on the steamer. The coal that I was weighing

(Testimony of Hugh Edwards.)

was discharged directly into the ship. The tare weights were marked on the cars. The weigher informed me that those tares were taken every so often on all the cars. The cars were weighed separately and not by trains. As the trains came down the first car was weighed and the train was pulled forward sufficiently to weigh the next car and so on to the end of the train. The net weight of the coal was taken by taking the tare weight marked on the car and subtracting that from the gross weight of the car. Record was kept of the weight of each carload of coal by the weigher who had a tally sheet. I do not think that the weights were being taken on what is known as a rising-beam. The weights were taken as accurately as they could be obtained, not down to the pound, however, but by 5's and 10's as coal is usually weighed. When you weigh by 5's and 10's the weights usually average themselves and even up. No advantage was given to either party in using these weights. Answering the question as to what I mean by weighing by 5's and 10's, I would say that "as near as I can [102—48] remember the scales are only marked on the 5 lbs., you know, on the 5 lb. beam. They did not weigh it as other scales do by lbs. and ounces, but it is just weighed by 5's, you know; but I am not positive of that."

(The prosecution here produces what purports to be a chart of Nanaimo. Counsel for defendants agree that it may be used for showing in a general way the general location of scale-house and tracks, on the understanding, however, that they do not stipu-

(Testimony of Hugh Edwards.)

late as to the correctness of the tracks, or any of the dock-houses and that they are not foreclosed with reference to any object appearing on the chart which they may hereafter desire to dispute.) The chart shows the harbor as it looked when I was at Nanaimo. The tracks from the shaft of the mine to the scale-house ran right by the shore line and on leaving the scale-house ran down the shore line to the bunker. In other words, the tracks from the mine to the bunkers would pass the scales. A track scale was used and the track thereof connected with the general track last above described. (The chart above referred to was here introduced in evidence as United States Exhibit Number 21 to illustrate the position of the tracks in a general way and the location of the harbor.) The object designated "loading wharf" in this chart is the wharf upon which the bunkers are located. I do not think that any carload of coal passed over the scales, while I was in the scale-house, that was not weighed. I think the coal at the dock was discharged directly into the ship from the cars. I think the bunkers on the dock were divided into compartments. The only records of the weights of the coal that I know about which were kept by the Western Fuel Company were those taken by the [103—49] company weigher on tally sheets. I also kept weights myself and kept them accurately and truly, and they agreed with the weights kept by the company's weigher because we were taking the weights together at the scales. The coal which was loaded in the two boats that I saw there was destined



(Testimony of Hugh Edwards.)

for various Alaska ports. The boat was the Steamship "Seward." She cleared in Seattle. I was weighing coal at Nanaimo into this ship 39 hours consecutively, stopping only for lunch. I acted as weigher for all coal that was laden upon that steamer. I think the steamer came back to Seattle and duty was paid on the coal in Seattle. I think the object in sending an inspector from Seattle to Nanaimo was so that this coal might be cleared in Seattle so that it might enter the Alaska ports without the supervision of the customs officers because the coal goes to ports that have no weighing facilities. With this particular cargo, however, I am not positive. (The testimony included in the last statement was admitted over the objection of the defendants, to which exception was duly taken.) The reason I am not positive respecting this particular cargo is that after we got through at Nanaimo, the vessel went to Bellingham and I came back from Bellingham to Seattle. Bellingham is in the same district with Seattle. I do not know of my own knowledge whether the duties paid by the United States Government upon that coal were paid at either Bellingham or Seattle, and I do not even know whether the duties were paid in the district of Puget Sound. I cannot say for certain whether the duties were paid upon that particular cargo of coal. The vessel that I have been referring to arrived at Bellingham on September 19, 1907. The coal was not reweighed at Bellingham. It was not taken out of the boat and weighed at Seattle to my knowledge. I did [104—50] not see the

(Testimony of Hugh Edwards.)

ship's manifest before she left the Port Nanaimo or the invoice, if there was such.

I have never visited the Ladysmith mine, and the occasion to which I referred was the last and only occasion upon which I visited Nanaimo.

Cross-examination by Mr. McCUTCHEN.

I do not know whether or not there is more than one mine at Nanaimo belonging to the Western Fuel Company. I do not know from what mine this coal I weighed up there came from. The Western Fuel Company weigher and I weighed together, I handled the beam part of the time and he handled the beam the other part of the time and we took the same weights and they necessarily agreed. I was sent to Nanaimo to weigh coal by the Chief Inspector of the port at Seattle. It was either because there was no government weigher at the Alaska ports or that there were no weighing facilities at the different ports that I was sent there.

**[Testimony of Guy M. Watkins, for the Government.]**

GUY M. WATKINS, a witness called for the United States, and sworn, testified as follows:

Direct Examination by Mr. ROCHE.

I live and have lived in Portland, Oregon, 9 years, and am and have been for 23 years last past Special Inspector of Customs there. I visited the Western Fuel Company's mine at Nanaimo once,—that was in the spring of 1911. I stayed there a portion of the day. The mines were at that time closed down.

(Testimony of Guy M. Watkins.)

There was a strike on. I did not see the records of the company so as to find out what their system of weighing, etc., was. The [105—51] scale-house is in the neighborhood of half a mile from the bunkers. The track from the mine to the bunkers passes over the scales. I believe there are two sets of such tracks, one of which passes over the scales and is then connected by a switch with the other beyond the scales and toward the bunkers. The day after I was at Nanaimo I visited the Ladysmith mine and was there a part of a day. I went into the scale-house at the Ladysmith mine. About two train loads passed over the scales and were weighed, and then I followed them down to see that they were dumped into a vessel. There are bunkers about a quarter of a mile from the scales. The bunkers were right in the harbor, and the boats ran right alongside them and the coal was dumped from the car down a chute into the vessel direct. The cars from the mines passed over the scales, and I think there was another track leading back to the mines. The track which lead from the mine to the bunkers passed over the scales. Two train loads passed over the scales and both were weighed while I was there.

Cross-examination by Mr. McCUTCHEN.

To the best of my recollection the switches at Nanaimo were beyond the scale-house. I was at Nanaimo a good portion of the day and my recollection about the situation is not hazy. I would be surprised to hear that the switches were to the mine side of the scale-house because my impression, though it was

(Testimony of Guy M. Watkins.)

only an impression, is otherwise. I saw no coal weighed there, the mines being closed down.

**[Testimony of F. B. Winebrenner, for the Government.]**

F. B. WINEBRENNER, a witness called for the United States, and sworn, testified as follows:  
[106—52]

Direct Examination by Mr. ROCHE.

I live and have lived in Seattle for something over ten years, and have been acting in the capacity of weigher and gauger in the Government service for about five years though my official appointment has been within the past year. I visited the mines of the Western Fuel Company in Nanaimo on March 29, 1909, remaining there four days. I was engaged in weighing coal which was to be taken to Seattle and discharged there. I went to Nanaimo to inform myself as to the method of handling the coal there. I went up to the mines themselves during off hours and walked around. I also visited the bunkers on the docks. The scale-house is somewhere in the neighborhood of half a mile from the bunkers. There was only one scales at the scale-house—it was a track scale. My recollection is that only one track passed over the scales, and that that was the track which came from the mine to the bunker. All the coal that went from the mines to the bunkers went over the scales. I think my hours of service were from 7 o'clock in the morning until 12 at noon, and from 1 o'clock until 5. The company's weigher worked with me. We took weights together. The cars were

(Testimony of F. B. Winebrenner.)

wooden cars on iron tracks and had a capacity of about 4 ½ tons of coal. The cars were weighed one at a time. The tare weight was marked on the cars. The coal having been weighed was taken directly aboard the vessel. I observed at the bunkers that the coal was discharged into a chute and put immediately aboard the vessel. The bunkers were partitioned off, but I don't recollect whether they were numbered. I could discover only one scale-house connected with the Nanaimo mine and I was located in that scale-house during the four days [107—53] I was there. I assisted in weighing all the coal that went into that vessel. The name of the vessel we were loading was the "Hayden-Brown." She subsequently went to Seattle. I went by rail to Victoria and thence by boat to Seattle. I did not see the bill of lading before we left Nanaimo, nor the invoice until I got into Seattle. The invoice and the weights that I secured were practically the same. I was never at Ladysmith.

Cross-examination by Mr. McCUTCHEN.

I visited only one mine at Nanaimo. I do not know whether the Western Fuel Company had more than one mine there or not. I do not know whether or not all of the coal mined by the Western Fuel Company at Nanaimo passed over the scales to which I have referred. The coal that was loaded while I was there did not go through the bunkers, but was laden directly on the ship from the cars. I do not know whether all of the coal that was mined by the Western Fuel Company at Nanaimo and which was



(Testimony of F. B. Winebrenner.)

loaded on vessels at Nanaimo passed over the scales to which I have referred, though all of the coal that went to the bunkers in my presence there went over the scales. Whether or not the Western Fuel Company was operating mines other than the mine I visited I do not know. There were bunkers alongside the tracks and near the dock. I saw some other bunkers over to the left—a distance of probably 100 yards. There was a track connected with these last-named bunkers. That track at the other end reached to the same point as the first track that I have discussed and the second track also passed over the scales. I saw no other bunkers in that locality, though I was there four days. When I say I walked to the mine, I mean that I went to the shaft from which the particular [108—54] coal that I was weighing came. I visited no other mine. I saw no other bunker or bunkers of any description other than those I have discussed. I did not look for others.

Redirect Examination by Mr. ROCHE.

I was sent by my superior officer to Nanaimo for the express purpose of ascertaining the method of weighing coal there.

Recross-examination by Mr. McCUTCHEN.

I was sent to Nanaimo to ascertain the method of weighing only that coal which is shipped to the city of Seattle. There may have been other mines in operation at Nanaimo than the one which I saw.

(Testimony of F. B. Winebrenner.)

Further Redirect Examination by Mr. ROCHE.

The coal which was being weighed at Nanaimo when I was there was bulk or lump coal. We called it simply "Nanaimo coal."

**[Testimony of D. C. Norcross, for the Government (Recalled)].**

D. C. NORCROSS, on the resumption of his direct examination by Mr. Roche, testified as follows:

I have not as yet been able to find the coal statement for April, 1906.

On December 31, 1912, the Western Fuel Company had five barges: The "Comanche," "Nanaimo," "Ruth," "Theobald," and "Ludlow." I am not sufficiently familiar with those barges to attempt to describe them. We also owned the "Melrose"—that makes the sixth barge, and for that matter I ought also to add the "Wellington." We had the "Comanche" in 1903 and the "Ruth" in 1905. In addition to the seven barges which I have named the Western Fuel Company once had the "Corsair," and there [109—55] may have been another one which was worn out and dismantled. It was several years ago when the two last-mentioned barges went out of service. The Western Fuel Co. never owned, controlled, or operated any barges other than those already named.

The defendant, Joseph L. Schmitt, has been director and treasurer of the Western Fuel Company since 1906. Prior to that time there was no treasurer and the funds were deposited in the First National Bank.

(Testimony of D. C. Norcross.)

Defendant Robert Bruce is now director of the company. He occupies no other office. He has been a director, I believe, since 1905, but not continuously. He took the place on the board of directors of J. C. Wilson. (Here admitted by defendants that Robert Bruce became a director March 23, 1905, and that he remained such until April 29, 1909, and that he again became a director April 6, 1911, and ever since has been and still is a director.) He held no position except that of director except that he was a member of the executive committee appointed by the board of directors, which committee, so far as I know, met some half dozen times. Sidney V. Smith never held any position except that of director, except that at the first meeting at the time of the incorporation he acted as secretary.

The defendant F. C. Mills is superintendent of the docks. His superintendency includes all of the docks of the Western Fuel Company in San Francisco and dates from the incorporation of the company. Mr. Mills has also had the supervision of the barges and the crews upon the barges and of the employees on the docks.

Defendant, E. H. Mayer, is the check clerk and weigher on the bunkers, mostly on the Folsom Street bunkers. He has been in the employ of the company since the first of January, 1904, and during all of the intervening time has been employed in the capacity mentioned. His immediate superior is Mr. Mills. The defendant Edward J. Smith is a checker or tally clerk and has been such for the last two or

(Testimony of D. C. Norcross.)

three years. He was not employed by the Western Fuel Company prior to that time. He performs his services upon whatever docks or barges they [110—56] may be required. He was never employed on the bunkers so far as I know, as I understand it, his services are usually rendered on barges loading coal into vessels that are supplied with fuel by the Western Fuel Co. The officer in charge of each barge is the foreman. I do not know the names of any of the barge foreman of date December 31, 1912. I never come in contact with them. The greater part of coal imported into San Francisco from Nanaimo is lump coal, though there is some steam coal. Lump coal is coal that has already passed over the screen. This lump coal is called Nanaimo or Wellington coal. The steam coal is designated Wellington steam coal or steam coal alone. We used to discharge a great deal of the Wellington lump coal at the Mission Street bunkers as well as at Folsom Street until the Mission Street bunkers were taken down in 1908 or 1909. I don't remember myself ever going upon the Mission Street bunkers, and I do not recall anything about the location of the scale-house upon said bunkers. There is a pretty steep stairway up to the bunkers on Folsom Street on the west side of said bunkers; it is pretty steep. It ascends to a door which I think is kept locked. I believe there is a sign of "No Admittance" on the lower works. Whether there is any other means of access to the bunkers than the stairway which I have mentioned I do not know. The general public is not admitted

(Testimony of D. C. Norcross.)

to the bunkers. The Folsom Street yard is just across the Embarcadero and is connected with the bunkers by a tramway. It is a good sized yard. We have another yard on Beale Street, but I do not know whether we are using it or not. The coal is brought there by teams. The greater portion of our foreign coal is now and has been for years discharged at the Folsom Street bunkers. The Western Fuel Company also operates in Oakland. It rents bunkers there which are known as the Howard Bunkers. All foreign coal imported by the Western Fuel Company and discharged at Oakland is discharged at the Howard Bunkers. Our office in Oakland is at First and Market Streets. There are records kept of the coal received and coal sold both at San Francisco and Oakland. These records were compiled from month to month and are kept in the San Francisco office of the Western Fuel Co. The coal imported [111—57] into California via Port San Diego was recorded in San Francisco and practically charged against the San Francisco office.

The kinds of coal imported during these years by the Western Fuel Company were Australian, Japanese, British Columbia, Comax and Wellington. The Wellington coal was imported exclusively from Nanaimo and Ladysmith. Up to 1907 most of the Wellington coal came from Nanaimo; all of the New Wellington coal came from Nanaimo. The Comax coal came from Comax, British Columbia. We import but very little Japanese coal. From Australia we imported Richmond and Aberdeen coal



(Testimony of D. C. Norcross.)

but called it all generally Australian coal. The proportion of coal imported from Australia as compared with British Columbia was small. I should say that in 1912 75% of the coal imported was Australian. That was on account of the strike at the Nanaimo Mine. In the year 1911 I should say 40% of the coal imported was Australian.

BE IT REMEMBERED that thereupon the following proceedings occurred and that the following testimony was given:

“Q. Are there daily records kept by the Western Fuel Company showing receipts of coal from all sources? A. Yes.

Q. Including foreign coal imported? A. Yes.

Q. And are there also daily records kept by the Western Fuel Company of sales or distribution of coal? A. Yes.

Q. And it is also true that at the end of each month from those daily records are compiled statements showing the total amount of coal received and the total amount of coal sold by the Western Fuel Company, for each calendar month? A. Yes.

Q. By whom are the monthly reports compiled?

A. By Mr. Martin, the bookkeeper.

Q. And checked over by anyone?

A. Yes, by two or three; he makes the final summaries. [112—58]

Q. That is, they are checked by two or three, but Mr. Martin makes the final summaries; is that correct? A. Yes.

Q. And the Western Fuel Company from time to

(Testimony of D. C. Norcross.)

time has acted, has it not, upon the monthly statements?

Mr. McCUTCHEN.—I object to that, if the Court please, as calling for the conclusion of the witness.

Mr. ROCHE.—Very well; I will withdraw the question.

Q. It is also a fact, is it not, Mr. Norcross, that separate monthly summaries, so far as tonnage was concerned, were kept for the San Francisco and the Oakland depots?

A. The bookkeeper made those and kept them, yes.

Q. And they were kept separately? A. Yes.

Q. In other words, there was a separate statement made out for the San Francisco office and another separate statement for the Oakland office?

A. That is correct.

Q. I direct your attention to a paper entitled "Western Fuel Co. Coal received at San Francisco Depot, April 30, 1906, coal account," and ask you if that is the monthly statement for the month of April, 1906.

A. That is the detail of coal received, yes.

Q. Does that statement show the quantity of coal on hand in the Western Fuel Company, on the 1st of April, 1906? A. No, it does not.

Q. Does it, so far as the San Francisco depot is concerned? A. No, sir, it is not supposed to.

Q. You say it is not supposed to? A. No.

Q. Now, I call your attention to another report or statement entitled, "Western Fuel Co., coal received at Oakland Depot, April 30, 1906, coal ac-

(Testimony of D. C. Norcross.)

count," and ask you if that is the monthly statement for the month of April, showing coal received at the [113—59] Oakland Depot? A. That is correct.

Q. Before offering those documents in evidence I want to call your attention to another statement dated April 1st, 1906, entitled "Western Fuel Co., summary of receipts, sales and profits, Oakland Depot, Coal Account," and I ask you to look at that and state whether that statement shows the quantity of coal on hand at the Oakland Depot on the 1st of April, 1906? A. Yes, it does.

Q. It does not show the totals, does it?

A. Certainly it does.

Q. It shows the totals of all coals, but I mean that the domestic coal is not separate from the foreign coal.

A. Yes, it is; the detail of each kind of coal constituting the stock on the first day of April.

Q. You don't understand me, Mr. Norcross, I say you have not a total of all the foreign coal on hand; in other words, these figures have to be added up?

A. I don't know what you mean by that. They are added up at the bottom. That is the total of all the coal on hand on April 1st, 1906.

Q. And this statement showing total amount of coal on hand on April 1, 1906, includes the domestic coal, does it? A. Yes.

Q. That is what I am trying to get at, the total of foreign coal is not separate from the total of domestic coal on hand? A. No, it is not.

Q. This statement was compiled by whom, and

(Testimony of D. C. Norcross.)

from what source?

A. Compiled by the bookkeeper from his regular daily [114—60] records, purchases and sales.

Q. And was checked up? A. Certainly.

Q. Does this statement show in tons the amount of coal received during that month at this depot?

A. Yes, the totals of each kind.

Q. And the total balance on hand? A. Yes.

Mr. ROCHE.—We offer these documents in evidence, may it please the Court.

Mr. McCUTCHEN.—Mr. Roche, do you claim that these documents were seen by these defendants?

Mr. ROCHE.—By what defendants?

Mr. McCUTCHEN.—By any of the defendants.

Mr. ROCHE.—I don't know whether they were seen or not, We are offering them for the purpose of showing the quantity of coal on hand on the 1st day of April, 1906; and we intend to follow this up by showing from the records of the Western Fuel Company the amount of coal received between that date and the 31st of December, 1912.

Mr. McCUTCHEN.—Unless counsel says, if your Honor please, that he proposes to show that these papers were seen by these defendants, we object to the offer.

Mr. ROCHE.—Of course counsel understands this, may it please the Court—what is the ground of your objection, Mr. McCutchen?

Mr. McCUTCHEN.—That the defendants are not bound by these papers unless they saw them. You say you do not propose to show that the defendants

(Testimony of D. C. Norcross.)

ever saw them. Unless you do they are certainly not admissible against the defendants.

Mr. ROCHE.—This is the situation, if your Honor please: It is necessary for the Government in this case to [115—61] show, among other things, first the quantity of coal the Western Fuel Company had on hand on a given date; the quantity of coal received by the Western Fuel Company from that date to another given date, which we will arbitrarily fix at this time as the 31st of December, 1912; and likewise to show the quantity of coal sold between those two dates, and the quantity of coal on that date, for the purpose of establishing the excess of coal over the importations; in other words, that the Western Fuel Company did sell during that period of time a number of tons of coal above and beyond the tonnage of coal received by it. Now, of course, it is true, may it please the Court, that a record which is not brought to the attention of one of the defendants is not ordinarily admissible in evidence, but that of itself does not prevent us establishing by testimony which is admissible and which is in fact practically the only testimony available, by the records of the company the quantity of coal which was in the possession of the company, the quantity of coal which was subsequently received by the company, and likewise the quantity of coal which was disposed of by the company during that same period of time.

Mr. McCUTCHEN.—We don't put our objection upon that ground, but we do object that these documents are not admissible against these defendants,



(Testimony of D. C. Norcross.)

if the defendants have never seen them.

Mr. ROCHE.—Then, as long as counsel does not object upon the ground that the evidence is not the best evidence, and that these entries are not original entries, may it please the court, it occurs to us that the objection must be overruled because they are being offered at this time for the purpose of establishing what appears to exist upon their face. [116—62]

The COURT.—The objection is overruled.

Mr. McCUTCHEN.—We note an exception.

Mr. ROCHE.—I just want to read into the record a part of this, and the balance can be considered as read. Is that satisfactory?

Mr. McCUTCHEN.—Yes.

Mr. ROCHE.—“Coal on hand, April 30, 1906, Duns.” I suppose that means Dunsmuir Wellington. Will you read this, Mr. Norcross, I don’t know exactly how that is divided.

A. “Dunsmuir Wellington, 5615 tons, 2168 lbs.; New Wellington, 64 tons, 1536 lbs.; New Wellington screenings and slack, 4212 tons, 1473 lbs.; Australian, 1099 tons, 73 lbs.; Cannel, 26 tons, 1160 lbs.; Cannel screenings, 40 tons; Welsh Anthracite Screenings, 1451 tons, 350 lbs.”

Q. That is all of the foreign coal; can you add those figures up?

A. Total 12,510 tons and 40 lbs.; that addition, Mr. Roche, is subjection to correction, of course, if I have made any mistakes.

(Testimony of D. C. Norcross.)

(The document was here marked "U. S. Exhibit No. 22.")

Q. Now, I direct your attention to another sheet, similar in kind, only relating to the San Francisco Depot, entitled "Western Fuel Co. Summary of Receipts, Sales, and Profits, San Francisco Depot, Coal Account," and ask you whether that sheet indicates, among other things, the amount of coal on hand in the San Francisco Depot belonging to the Western Fuel Company on the 1st day of April, 1906? A. That is correct.

Q. And this was compiled, as already indicated by you and in the same manner as the exhibit last offered in evidence was compiled; is that correct?

A. Yes. [117—63]

Mr. ROCHE.—We offer this document in evidence.

Mr. McCUTCHEN.—We make the same objection. I suppose that that objection can be considered as made to all these offers, and the objection overruled and an exception taken.

Mr. ROCHE.—Yes, we will stipulate that; that is, the objection proceeds on the same grounds already stated.

Mr. McCUTCHEN.—Yes. Is that satisfactory, your Honor?

The COURT.—Very well.

Mr. ROCHE.—The entire document may be considered as having been read. I just desire to direct the attention of the jury to the foreign coal on hand:

(Testimony of D. C. Norcross.)

“Dunsmuir Wellington, 3044 tons, 500 lbs;  
New Wellington, 17125 tons, 1513 lbs;  
Comax coal, 1191 tons, 1251 lbs;  
Australian, 270 tons, 44 lbs;  
Cannel, 128 tons, 1304 lbs.”

Q. Is there any other foreign coal on that?

A. No.

Q. Now, will you kindly add those figures up?

A. You made a mistake about this Dunsmuir Wellington, those figures mean that that was oversold.

Q. It is under the designation of “coal on hand”?

A. It is, but it is in red ink.

Q. You say that the Dunsmuir Wellington, 3044 tons, 500 lbs., ought not to be included as coal on hand?

A. It should be deducted; also the other red-ink figures. Is not Comax in red ink?

Q. What is your explanation of that?

A. That those coals on the stock records have been oversold that quantity. This one possibly has been undersold. You cannot separate them. [118—64]

Q. In other words, that 3044 tons and 500 lbs. had been sold more than the books showed were on hand?

A. They get confused, Dunsmuir and New Wellington and Comax.

Q. In reading the Oakland statement, did you eliminate from consideration the figures in red ink?

A. I don't think there were any.

Q. Will you then read into the record the foreign coal on hand in the San Francisco Depot on the 1st of April, 1906, as indicated by that statement?

(Testimony of D. C. Norcross.)

Mr. ROCHE.—I might say to the Court that we do not desire to have the witness make any calculations excepting so far as the first month is concerned; in other words, we desire to get into the record the exact amount of coal on hand on that date for the purpose of comparing those figures with the sheet heretofore furnished to us by the witness and which apparently at this time is lost or temporarily misplaced.

A. Of the British Columbia coal there was on hand 12,889 tons, 2002 lbs. The Australian coal was apparently oversold 270 tons and 44 lbs. We had on hand of Cannel coal 128 tons, 1304 lbs.

Q. What is the total amount of foreign coal on hand in the San Francisco office at that time?

A. 12,748 tons, 1022 lbs.

Mr. ROCHE.—I might say, Mr. McCutchen, that that is within tons of the quantity of coal on hand indicated on the sheet which was indicated by the witness yesterday afternoon—which was referred to by him.

Mr. STANLEY MOORE.—That comes, Mr. Roche, within 8 tons of the number of tons on the sheet furnished by the witness [119—65] heretofore. Let me ask you, does that include the poundage?

Mr. ROCHE.—No, I don't think we figured on the lbs.

Mr. STANLEY MOORE.—Well, I think that if you did figure on the poundage that you would come even closer than the 8 tons.

(Testimony of D. C. Norcross.)

Mr. ROCHE.—Q. Did you take into consideration the number of lbs. too in making this calculation?

A. Yes, it is supposed to be exact.

Q. Well, this approximation is subject to correction in any event.

Mr. STANLEY MOORE.—Well, it is substantially correct.

Mr. ROCHE.—Yes.

(The document was here marked “U. S. Exhibit No. 23.”)

Q. Do these figures indicate all of the foreign coal on hand and in the possession of the Western Fuel Company, both in San Francisco and in Oakland, on the 1st day of April, 1906?

A. It indicates what our books called for on that date.

Q. What I am trying to get at is an explanation of these items contained in your books; is it not a fact that those two items are supposed to show all of the foreign coal on hand in San Francisco and in Oakland on the 1st of April, 1906?     A. Yes.

Q. That is correct, is it?     A. That is correct.

Q. And the Western Fuel Company, to your knowledge, had no other foreign coal on hand in the State of California?     A. No.

Q. Because the San Diego Depot, if there was any coal on hand at that time, there, was taken into consideration in fixing up the figures, or compiling the figures for the San Francisco office?     A. Yes.

Q. I direct your attention to a number of sheets and ask you to look at them for a moment and to



(Testimony of D. C. Norcross.)

state whether [120—66] those are the monthly sheets showing coal received by the Western Fuel Company in San Francisco and in the Oakland office for the months commencing with the month of May, 1906, and ending with the month of December, 1906?

A. Here is the month of April; this is coal received for the month of April.

Q. Well, this is an entirely different statement. I will have that put with the other statements.

A. Those are the statements of coal received.

Q. Now, I call your attention again to those two sheets which you handed me a moment ago, and I ask you whether these two sheets do not also show coal received during the month of April?

A. These are the totals. Those show the details—

Q. (Intg.) Mr. Norcross, you are mistaken about that, are you not? Those are not the two sheets you made the additions on?

A. No, those are the two sheets you have in your hand now for the month of April.

Q. That is what I am talking about, showing the coal received.

A. Yes, the detail of the coal received; they are the same as those.

Q. That is, they are the same as these other statements you have just handed me? A. Yes.

Q. They are not the same as the two statements you testified to a few moments ago which have been introduced as "U. S. Exhibits 22 and 23," are they?

A. They are not.

Q. Each of these statements indicating coal re-

(Testimony of D. C. Norcross.)

ceived at Oakland during a given month does show all of the coal received at the Oakland Depot for that given month?     A. That is right. [121—67]

Q. Including all foreign coal?     A. Yes.

Q. And each of these sheets purporting to show coal received at San Francisco for each particular calendar month does show all of the coal received by the Western Fuel Company in San Francisco?

A. Yes.

Q. So that both of these sheets together do show all of the coal received by the Western Fuel Company in the State of California for each given calendar month?     A. Yes.

Q. That is correct, is it?     A. Yes.

Q. And these sheets cover from April 1, 1906, to December 31, 1906?     A. I did not look that over.

Q. Well, just look at them so that you can answer that question.

A. That is correct, April to December.

Q. Let me ask you one other question with reference to the imported coal so far as these weights are concerned; It is also true, is it not, Mr. Norcross, that so far as the foreign coals are concerned upon which the Western Fuel Company paid duty during the months indicated by those statements, that is, from and including the month of April, 1906, to and including the month of December, 1906, the weight of coal contained in these statements is the weight upon which the duties were paid; in other words, the ascertained weight; that is correct, is it?

A. That is correct.

(Testimony of D. C. Norcross.)

Q. And is not the invoice or bill of lading weight, excepting in those cases, if there were any such cases, in which the invoice or bill of lading weight agreed with the ascertained weight?

A. That shows the custom-house weight of the coal.

Mr. ROCHE.—I think we had probably better have these marked separately, Mr. Clerk. I will offer all of [122—68] these statements at the one time, Mr. McCutchen, subject to your objection, of course, and it may be stipulated that the objection applies to each one.

Mr. McCUTCHEN.—Yes, and an exception.

(The documents were here marked “U. S. Exhibits, 24 to 42, inclusive, respectively.”)

Mr. ROCHE.—Q. Now I direct your attention to what purports to be statements of coal received from and commencing with the month of January, 1907, to and including the month of December, 1907, twelve representing the coal received by the Western Fuel Company at its San Francisco depot and the other twelve purporting to indicate the coal received by the Western Fuel Company during that year at its depot at Oakland, and I ask you whether those statements correctly show for each month the coal received at the San Francisco depot and the coal received at the Oakland depot? A. That is correct.

Q. And these statements altogether represent and show all coal from all sources received by the Western Fuel Company in the State of California during that year; that is, during the year 1907? A. Yes.

Q. And so far as the imported coals are concerned,

(Testimony of D. C. Norcross.)

the weights are based not upon the invoice or bill of lading weight, but upon the custom-house weight or ascertained weight?

A. Upon the custom-house weight.

Mr. ROCHE.—We offer these in evidence, subject to the same objection. Do I understand, Mr. McCutchen, that it is your desire that these be extended in the notes?

Mr. McCUTCHEN.—I should think not.

(The documents were here marked, “U. S. Exhibits 43 to 66, [123—69] inclusive, respectively.”)

Mr. ROCHE.—Q. Now, I direct your attention to another batch or bundle of statements purporting to show coal received by the Western Fuel Company at its San Francisco depot and also coal received during the year 1908 by the Western Fuel Company at its Oakland depot and ask you to examine those statements and state whether they are the monthly statements for the year 1908 showing all coal received at the San Francisco depot and also at the Oakland depot? A. That is correct, 1908, coal received.

Q. And these weights are based, are they not, upon the ascertained or custom-house weights, so far as the coal is concerned? A. Yes.

Q. And not upon the invoice weights or bill of lading weights, unless they agree with the ascertained weight?

A. They are the invoice weights so far as we are concerned.

Q. You say they are the invoice weights so far as you are concerned, but were not the weights repre-

(Testimony of D. C. Norcross.)

sented by the invoices?

A. On all foreign coal we buy on the custom-house weights, and that is what is invoiced to us, by the custom-house weights.

Q. So far as the weights contained in these statements are concerned, they are the custom-house weights, or the ascertained weights, are they not?

A. The amounts invoiced to us.

Q. You do not want to be understood as saying that they are the weights contained in the invoice at the [124—70] time the coal leaves the foreign port?

A. Well, I don't know about that.

Q. Or the bill of lading weights?      A. No.

Mr. ROCHE.—We offer these statements in evidence.

Mr. McCUTCHEN.—Haven't you a summary of these statements, Mr. Roche?

Mr. ROCHE.—We will prove that when we put Mr. Tidwell on the stand. I have to lay the foundation first.

Mr. McCUTCHEN.—I thought the witness probably had furnished you with a summary.

Mr. ROCHE.—Q. Now, I direct your attention to another batch of monthly statements and ask you to examine them and state whether these monthly statements show all coal of every kind, character and description whatsoever received by the Western Fuel Company for each calendar month for the year 1908 both at the San Francisco depot and at the Oakland depot.

Mr. McCUTCHEN.—Can't you shorten this, Mr.



(Testimony of D. C. Norcross.)

Roche, by offering all the other years at the same time?

Mr. ROCHE.—There are only one or two years. I will do that, however. I wanted to call his attention to some other matters.

A. Yes, these are correct.

Q. And your evidence, so far as weights are concerned, indicated on these records, would be the same as you have already given with relation to the other statements? A. Yes.

Mr. ROCHE.—We offer these.

(The documents were here marked “U. S. Exhibits Nos. 67 to 90, inclusive, respectively.”)

Q. Now, I direct your attention to three other batches of these statements, one relating to the year 1910 [125—71] and the other relating to the year 1911 and the other relating to the year 1912, and I ask you to examine these statements and state whether they show all coal received from every source by the Western Fuel Company in the State of California, during those three respective years?

Mr. STANLEY MOORE.—Mr. Roche, the witness knows that these statements were all furnished by the company, and if you have examined them and know that they are there, what is the use of going over that with every one of those batches?

A. Well, I counted them all; I know they are correct.

Mr. ROCHE.—It is stipulated that these statements are the statements for these three years and

(Testimony of D. C. Norcross.)

represent all coal received, subject of course to your correction.

Mr. McCUTCHEN.—Yes.

Mr. STANLEY MOORE.—And it is stipulated that they are all there.

Mr. ROCHE.—And in order to facilitate the work of the clerk I suppose these may be numbered in batches; that is to say, these three years which I have just questioned the witness about may be numbered in batches?

Mr. McCUTCHEN.—Yes. Mr. Roche, that should be with the qualification heretofore stated by you, that the weights indicated on those statements are custom-house weights?

Mr. ROCHE.—So far as imported coal is concerned, yes. By custom-house weights you mean the coal weighed at the time it was discharged at the San Francisco and the Oakland ports?

Mr. McCUTCHEN.—Yes. [126—72]

(The three batches of statements just referred to were marked as follows: “For the year 1909, U. S. Exhibit No. 91; for the year 1910, U. S. Exhibit No. 92; for the year 1911, U. S. Exhibit No. 93.”)

A similar statement for 1912 was introduced in evidence and marked U. S. Exhibit 94.

Q. Now, I want to direct your attention to two or three of these statements, particularly to the statement for the month of June, 1906; referring to “U. S. Exhibit No. 29” I call your attention to the following: “O R ex-barges 559 tons, 367 lbs.” I ask you to explain that item.

(Testimony of D. C. Norcross.)

A. That is an overrun, total overrun of deliveries out of barges for that month.

Q. For what month?

A. For the month of June, 1906.

Q. What do you mean by overrun?

A. I mean excess reported over weights reported having been in the barges.

Q. Then that item explained means this, that 559 tons of coal were taken off the barges more than placed into the barges during the month of June, 1906? A. I do not know that it does.

Q. Well, what does it mean?

A. It means that Mr. Mills reported having taken off that much more than he reported having taken in.

Q. And Mr. Mills is your dock superintendent?

A. Yes.

Q. Then the explanation of that item is, that Mr. Mills, he being one of the defendants in this case, reported to the company that he took off the barges 559 tons and 367 lbs. more coal than was put on to the barges? A. That is right.

Q. I just want to call your attention to two or three of these items, Mr. Norcross, because I suppose your [127—73] explanation will be the same as to all of them. A. It probably will.

Q. In the month of September, 1906, picking out a typical case, or one that may be a little bit exaggerated, I see on this statement of coal received is "O R 769 tons, 1741 lbs."; will you just look at that item please and state to what that refers?

A. I don't know whether that was a yard overrun

(Testimony of D. C. Norcross.)

or a barge overrun; it don't state.

Q. In any event it is an overrun?

A. An overrun of coal, yes.

Q. Of how much coal?

A. 769 tons, 1741 lbs.

Q. Did Mr. Mills likewise have charge and supervision over your yard?      A. No.

Q. Who is the superintendent of your yard?

A. Mr. Miller.

Q. This overrun would be based upon reports returned by Mr. Mills and by Mr. Miller, or one of them; is that correct?      A. Yes.

Q. And it was based upon the report that there was sold 769 tons, 1741 lbs. coal more than coal received?

Mr. McCUTCHEN.—I object to that as leading and suggestive; the witness has not said that.

Mr. ROCHE.—Very well, I will withdraw that question.

Q. Explain that item?

A. It means there was an excess of coal on hand over the amount called for by the book record by that many tons, if it was yard business.

Q. And if it was barge business it would be subject to the explanation that was made by you a few minutes ago relating to another item? [128—74]

Mr. McCUTCHEN.—I object to that as calling for the guess of the witness.

A. It means that Mr. Mills reported that much more out than he charged himself on his books with having taken in.

(Testimony of D. C. Norcross.)

Mr. ROCHE.—Q. For the month of July, 1906, there is an item, “Overrun ex-barges, 237 tons, 298 lbs”; that is an item which would be susceptible of the explanation which you have just given?

A. Yes.

Q. That is correct, is it not?

A. Yes, that is correct.

Q. And taking the month of August, 1906, I notice this item: “Ex-barges 158 tons, 1572 lbs.”; that likewise would be explained by the same sort of an explanation? A. Yes.

Q. Let me direct your attention to the month of October, 1906; I notice that there are three items of overrun here; “Overrun 808 tons”; what sort of an overrun is that, Mr. Norcross?

A. It don’t say; right under it is a barge overrun, it might have been a yard overrun, a cleanup of the yard pile.

Q. You say a cleanup of the yard pile; what does that mean?

A. It means if we put so many tons of coal in there and it lay there for months, or for a year or so, and we came to clean it up there might have been an excess in delivering that quantity of coal.

Q. Let me see if I get that correctly; is it your understanding that that does represent a yard overrun because there is also a barge overrun upon this statement?

A. And right under it, yes. [129—75]

Q. As I understand it, your explanation is that that represents that upon a cleanup in the yard there



(Testimony of D. C. Norcross.)

were 808 more tons taken out of the yard than your records showed were placed into the yard?

A. There was that much more coal in there than our books called for.

Q. That is, there were 808 more tons of coal in the yard and that had been taken out than your books called for; is not that correct?

A. It might still be in there; if we put in 3,000 tons, and our books showed that we were cleaned up, they would show 3,000 tons; or suppose we put in 10,000 tons, and we sold 10,000 tons, and we found we still had 808 tons on hand, that would be the overrun.

Q. Does this represent the coal on hand or does it represent that your yard was cleaned out by the sale of all the coal that you had, and that you sold 808 more tons from the yard than you put into the yard?

A. No, not necessarily.

Q. It could be susceptible to that sort of an explanation, couldn't it?

A. It could be if it were all cleaned out.

Q. Then it is one of two things; it either represents that after you sold all of the tons of coal that your books showed should have been or were placed in the yard, you still had 808 tons on hand, or that you sold 808 more tons from the yard than your books showed you had placed in the yard; is not that correct?

A. That is correct.

Q. I call your attention to another item upon the same statement for that same month of October. It must have been a cleanup month. Will you read that record, please? [130—76]

(Testimony of D. C. Norcross.)

A. "October 31, 1906, overrun, 1166 tons, 314 lbs."

Q. Can you state from this statement where that overrun occurred?

A. In October, 1906, probably at Folsom Street.

Q. Would that be the Folsom Street Dock?

A. No, in the yard.

Q. And in what yard, in your judgment, would this other overrun be?

A. There are two kinds of coal, are there not?

Q. Yes.

A. We had some very very large piles of coal in there on hand at that time.

Q. In the Folsom Street yard?

A. In the Folsom Street yard, yes. They were threatening to burst out into flames, there were signs of fire there and we turned a lot of hose in there. I think it was at that time. I know I had to put pipe in there and get water on it to keep down the heat and keep it from burning up.

Q. And you sold the coal after it had been wet?

A. Yes.

Q. And in selling the coal after the water had been placed on it, in view of these records, you evidently did not make any allowance for the water?

A. Not unless it ran off of it.

Q. So if the increased weights were due to water, of course the water was weighed with the coal at the time the coal was sold? A. Yes.

Q. Would you say that this overrun of 1166 tons, 314 lbs. also related to the coal which was contained in the same yard in which the other overrun appeared of some 808 tons?

(Testimony of D. C. Norcross.)

A. It probably was. I think most of our coal was [131—77] at that point at that time. The stock was getting down pretty low.

Q. Coal was selling very rapidly for some months after the fire, was it not?

A. Yes, I think that was the cleanup for a year's business.

Q. It would take a whole lot of water, would it not, put on top of coal to make an overrun of 1900 tons?

A. It would depend on how much coal you were handling.

Q. Well, all the coal in your yard?

A. It would not be the coal in the yard for one day or for one month, it would be the coal in the yard for one year, coal that had been passing through there and that had been stored.

Q. In the same month upon which these two overruns appear of 808 tons and 1166 tons also appears another overrun, "Ex-barges, 240 tons, 2065 lbs."; that is overrun during the month of October, 1906, that overrun relates exclusively to overrun upon the barges, does it not? A. Upon the barges, yes.

Q. You do not recall any danger of spontaneous combustion of coal on the barges during that month, do you, Mr. Norcross?

A. Well, there have been some, but I don't remember any for that month.

Q. Without going into all these statements, Mr. Norcross, your explanation of all items similar in kind appearing upon these other monthly statements would be the same as you have already given?

(Testimony of D. C. Norcross.)

A. Yes.

Q. That is correct, is it not? A. Yes.

Q. And it is also correct, is it not, Mr. Norcross, that in nearly each one of these monthly statements relating [132—78] to San Francisco there does appear some overrun, either as to the yard or as to the barges?

A. I think it is a pretty general thing.

Mr. ROCHE.—Of course, it may be considered, gentlemen, that all these statements have been read?

Mr. McCUTCHEN.—Oh, yes.

Mr. ROCHE.—Q. Mr. Norcross, the Western Fuel Company did keep during each month of the time that it was engaged in business and still keeps a monthly statement of coal sold, does it not?

A. Yes.

Q. Both in Oakland and in San Francisco?

A. Yes.

Q. And those monthly statements show every lb. of coal sold by the Western Fuel Company, first to the San Francisco depot, and secondly, the Oakland depot? A. Yes.

Q. And both together they show all of the coal sold by the Western Fuel Company which it receives or imports into the State of California? A. Yes.

Q. Where are those sales-sheets?

A. The summaries are in the summaries of coal receipts, sales and the balance on hand, which you have.

Q. Where are the monthly sheets themselves, do you know?

A. I did not know you wanted those. I told Mr.

(Testimony of D. C. Norcross.)

Tidwell they were embraced in the coal statement and he said that that was all he wanted instead of the details.

Q. Can you arrange to have those sheets sent up here tomorrow morning? A. Yes.

Q. And those sheets do show, as you have already indicated, all of the coal sales?

A. Yes, it is just what you have on those there. Mr. Roche, if you will pardon me [133—79] a minute, I believe you have those statements, you have the detail statements of all coal sales.

Q. No, we have not got them, Mr. Norcross.

A. I think they were prepared to be sent up here and I sent them up in that load.

Q. We have not been able to locate them.

A. I will find them for you then; they are up here.

Mr. ROCHE.—Will you stipulate, gentlemen, subject of course to correction, if it is hereafter discovered that any of these statements are not here, that the statements which I now hold in my hand are statements showing a summary of receipts, sales and profits during each calendar month, commencing with the month of May, 1906, down to and including the 31st day of December, 1912?

Mr. McCUTCHEN.—These are statements that came from the witness?

Mr. ROCHE.—Yes, statements that came from the Western Fuel Company's office.

Mr. McCUTCHEN.—They were made from month to month, were they, as the transactions took place?

Mr. ROCHE.—I will ask Mr. Norcross: Q. These



(Testimony of D. C. Norcross.)

statements, Mr. Norcross, which I hold in my hand, are statements which were compiled in the office of the Western Fuel Company from month to month?

A. Yes.

Q. Showing the total receipts and sales of coal, also the profits? A. Yes.

Q. Both for the San Francisco depot and for the Oakland depot? A. Yes.

Q. But they do not show the tonnage of coal?

A. Yes, they show the tonnage on hand on the [134—80] first of the month, and its value.

Q. In other words, they simply show totals?

A. The total tonnage of each kind of coal and the total tons sold.

Q. Let me call your attention to the exhibits already introduced in evidence and marked "U. S. Exhibits 22 and 23"; each of those statements are similar in kind as those two exhibits? A. Yes, sir.

Q. The overruns to which you have already testified are not specifically set forth in any of these statements, are they?

A. No, there is no detail in these; it is the total of each kind of coal.

Q. The totals in each one of these statements includes the overruns which appear upon the detail statements? A. Yes.

Q. And likewise disclose the value of the overage and the sale of the total coal, including the overage?

A. Yes.

Q. That is correct, is it not? A. Yes.

Q. And likewise the profit derived by the Western

(Testimony of D. C. Norcross.)

Fuel Company from the sale of coal for each calendar month during this period of time, including the sale of overage coal?     A. The gross profit.

Mr. ROCHE.—We offer these in evidence.

Mr. McCUTCHEN.—In that connection, Mr. Roche, you don't claim that any of these defendants ever saw any of those statements, do you? [135—81]

Mr. ROCHE.—I am not making any contention of that kind, may it please the court.

Mr. McCUTCHEN.—I am asking you that in connection with your offer, if you claim that any of the defendants ever saw any of these statements.

Mr. ROCHE.—We expect to show, may it please the Court, before we conclude this case, although it is not relevant at this time according to our theory of the case, that certain of the defendants not only saw the statements but were apprised of their contents; in fact, as the evidence already shows, these statements were built upon the figures furnished by Mr. Mills himself.

Mr. McCUTCHEN.—Do you expect to show that any of the other defendants, other than Mr. Mills, saw them?

Mr. ROCHE.—We certainly expect to show that the directors of the Western Fuel Company saw some of these statements, but that in law they were charged with knowledge of the statements. And in addition to that, so that counsel may understand what our position is, we intend to show that their attention was directed to these overruns. And I think we will

(Testimony of D. C. Norcross.)

show that before the witness on the stand leaves the stand.

Mr. McCUTCHEN.—We make the same objection to these papers as to the others.

The COURT.—The objection is overruled.

Mr. McCUTCHEN.—An exception.

Mr. DUNNE.—Mr. Roche, do these last statements put in by you publish upon their face any reference to overruns as such?

Mr. ROCHE.—No. [136—82]

Mr. DUNNE.—Then I understood you to say, and Mr. Norcross apparently to acquiesce in the statement, that this last bunch of statements showed or included the value of overage?

Mr. ROCHE.—That is correct.

Mr. DUNNE.—But that is not expressed upon the face of the statement.

Mr. ROCHE.—Oh, there is no question about that at all.

Mr. DUNNE.—I want that made perfectly clear.

Mr. ROCHE.—There is no question about that at all. Mr. Norcross testified that the details of the overruns appeared on the other statements we offered in evidence, and the details of the last exhibits included the overruns, the value of the overruns, and showed a sale of overruns, but the fact that they were overruns was not specifically shown on the face of those documents.

Mr. DUNNE.—I did not want any such implication to lurk in your question or in his answer. That is all.

(Testimony of D. C. Norcross.)

Mr. ROCHE.—I did not think there was any question about that, Mr. Dunne; I thought I made it perfectly clear.

(A book is here shown the witness.)

That is the first minute book of the Western Fuel Company. I did not attend the first meeting myself. After I became Secretary the minutes were written up by my stenographer. The minutes which appear on page 60 are those of the meeting of March 11, 1904, and were dictated by me.

(Admitted by the prosecution that Mr. Bruce was not at that time a member of the board of directors.)  
[137—83]

(An extract from said minutes was read in evidence showing the directors present to be Jno. L. Howard, Sidney V. Smith, Joseph L. Schmitt, James B. Smith, and showing the complete annual statement for the year ending December 31, 1903, and the statement for the month of January, 1904, to have been submitted and ordered placed on file. A document entitled "Western Fuel Co., annual statement for the year 1903," was shown the witness who stated that that document was submitted to said meeting of the board of directors, and is the statement referred to in the minutes. The jury's attention was directed to the following among other items appearing in said statement: "By overrun on Nanaimo coal at San Francisco \$9221.20.")

Nanaimo coal was the coal which was exclusively imported by the Western Fuel Company from Nanaimo. The item of overrun in the annual statement of

(Testimony of D. C. Norcross.)

1903 represented that the Western Fuel Company had on hand on the 31st of December, 1903, \$9221.20 worth of Nanaimo coal more than its books show that it ought to have had. The book value of said Nanaimo coal was about \$5 a ton so that said overrun would represent approximately 2,000 tons. (The document was here introduced in evidence and was here marked "United States Exhibit Number 96.")

(The witness' attention is here directed to another statement appearing on page 19 of the annual statement, United States Exhibit Number 96 and to the items "Total profits on sales \$93,196.66; add overrun at San Francisco \$1,874.94.") That is a statement of the abstracts of the coal sales at Nanaimo depot and shows the shipments of coal from Nanaimo to San Francisco and that the Government weighed \$1874.94 worth of coal more than Nanaimo claimed to have loaded into the vessels. That is to say, that [138—84] the coal which was imported by the Western Fuel Company from Nanaimo into the port of San Francisco exceeded by the custom-house weight the amount of money specified in value more than the coal was invoiced at at Nanaimo. In other words, in 1903, the boats coming here from Nanaimo containing the coal of the Western Fuel Company mined at Nanaimo and discharging at San Francisco discharged more coal than the invoice showed they contained, so that instead of there being a shortage in the coal imported by the Western Fuel Company from Nanaimo of any kind there was an overage. There was more coal discharged than the invoice or



(Testimony of D. C. Norcross.)

bill of lading called for at Nanaimo.

These minutes truly record the events as they actually occurred and truly set forth the number of directors present at the meeting and my testimony in this regard would be the same for all the minutes as for the particular minutes which have been above read. (Stipulated here by the defendants that the proper foundation has been laid for all the minutes.)

(There were here read in evidence extracts from the minutes of regular monthly and special meetings of the board of directors of the Western Fuel Company for the dates below specified showing James B. Smith among other directors to have been present at each said meetings owing that the previous minutes of the Board of Directors then remaining unapproved were read and approved and showing also in the language below quoted the adoption and filing of certain monthly statements:)

May 17, 1904. (Special meeting.)

“The regular monthly statements for the month of March, 1904, were submitted, approved and ordered placed on file.”

August 17, 1904. (Special meeting.)

“The regular monthly statements for the months of April, May and June were submitted and ordered placed on file.” [139—85]

December 23, 1904. (Special meeting.)

“The financial and business statements of the company for the months of September and October were submitted to the directors and

(Testimony of D. C. Norcross.)

explained, and were afterwards accepted by the board."

That explanation was undoubtedly made by Mr. Howard, the President.

March 23, 1905. (Special meeting.)

"The financial and business statements for the months of November and December, 1904, were submitted, and on motion duly seconded, were ordered placed on file."

It was the custom at the end of each year to submit the annual statement to the board of directors which annual statement would be examined and approved by them before it was submitted to the shareholders; the annual statements would then be read by the President and adopted, and then presented to the shareholders, so that the annual statement, for instance, for 1903, United States Exhibit Number 96, was, as I remember (the minute-book will show), not only submitted to the directors, but also to the stockholders at the latter's regular annual meeting. These annual statements are prepared by the President. He writes the report part of them. (The second annual report of the Western Fuel Company for the year ending December 31, 1904, is here introduced in evidence as "United States Exhibit Number 97." The attention of the witness was directed to the following item appearing under date December 31, 1904: "Overrun on coal sold joint account, \$739.94.") That item represents an excess of outturn of coal on the joint agreement that the Western Fuel Company had with the Wellington Collier Com-

(Testimony of D. C. Norcross.)

pany which was entered into in July. We sold them our coal as it stood in the yard subject to adjustment [140—86] on the final out-turn and there was an excess of some \$700 worth of coal. That coal was sold at \$5 a ton. Outside of the items to which my attention has been heretofore directed as contained in the annual statement for 1903 showing an overrun, overruns are included in the profit and loss account in the annual statement. The monthly statements for the years 1904 and 1905, and up to April, 1906, were destroyed in the fire and are not now in existence and there is no data in existence excepting the dock books showing overruns so far as profits are concerned. There probably were some overruns during the year 1904. The overrun for 1904 is embraced or included in the profit and loss account, if there was an overrun. The profit derived from the sale of excess coal or overrun coal would be embraced in the item: "Coal account earnings, \$33,894.97." There are no annual statements outside of those which you, Mr. Roche, hold in your hand now, being the statements for 1903 and 1904, showing in detail the total annual overrun. The President, or whoever was presiding, would in a general way explain the business of the month at the directors' meetings, and of the year at the stockholders' meetings. If any questions were asked he would answer them, and explain them.

(Counsel for the prosecution here read in evidence an extract from the adjourned annual meeting of the

(Testimony of D. C. Norcross.)

stockholders of the Western Fuel Company of March 23, 1905, in which the following statement appears: "The President read the directors' report of the operations of the company for the year ending December 31, 1904, submitting statements thereof.")

(There were here read in evidence extracts from the minutes of regular monthly and special meetings of the board of directors of the Western Fuel Company for the dates below specified [141—87], showing James B. Smith, among other directors, to have been present at each said meeting, showing that the previous minutes of the board of directors not theretofore approved were approved, and showing also in the language below quoted the adoption and filing of certain monthly statements:

July, 14, 1905. (Special meeting.)

"The financial statements for the months of April and May were submitted and explained by the President and, on motion duly seconded were ordered placed on file."

September 20, 1905. (Special meeting.)

"Financial and business statements for the months of June and July, 1905, were submitted and explained by the President, and, on motion duly seconded, were ordered placed on file."

November 14, 1905. (Special meeting.)

"The balance sheets and earnings and expense statements for the month of September and for the nine months ending September

(Testimony of D. C. Norcross.)

30th, were presented, and, on motion duly seconded, were ordered placed on file.”

April 17, 1906. (Special meeting.)

“The financial and business statements for the months of January and February, 1906, were submitted and, on motion duly seconded, were ordered placed on file.”

(Admitted by defendants that the document now shown them is the annual statement for the year ending December 31, 1906. Same offered in evidence and considered as having been read. The following extract therefrom read to the jury by the prosecution. [142—88]

“A mine output of 1500 tons per day, which at other periods was comfortable, became at once quite inadequate, and steamship trade, which ordinarily would have been welcome, caused temporary heart-ache because it diverted coal from customers who would have paid us double the rates per ton.”

Mr. OLNEY.—Mr. Roche, will you just read what went before that; if you do, I think it will explain that whole transaction.

Mr. ROCHE.—“The coal trade at San Francisco experienced two extreme conditions during the past year.

“The destruction of houses during the April fire caused such a shrinkage in the demand for domestic coal that in June we felt obliged to curtail our productive capacity by closing the Northfield mine. Storage yards were congested and we found tempo-



(Testimony of D. C. Norcross.)

rary employment elsewhere for some of our chartered steamers.

“After October, owing to the curtailment of supplies from Australia, Wyoming, Utah, and Washington, and to the revival of the demand, there came a veritable coal famine.

“The northern territory was visited with severe weather, and the calls upon the mines were greatly increased.

“Many foreign steamers, with whose owners we had bunkering contracts, happened to call upon us at this inopportune period, and we were obliged to supply their wants greatly to the delay of our own steamers, and to our detriment in this market.”

I suppose you gentlemen will concede that that reference relating to bunkering contracts were some of them with the Pacific Mail Steamship Company and to American bottoms foreign bound? [143—89].

Mr. OLNEY.—I think not.

Mr. ROCHE.—(Reading:) “The local steamship companies likewise made heavy calls upon us, and it really resulted in our being able to supply the domestic trade with the surplus after these other demands had been satisfied.

“A mine output of 1500 tons per day, which at other periods was comfortable, became at once quite inadequate, and steamship trade, which ordinarily would have been welcome, caused temporary heart-ache because it diverted coal from customers who would have paid us double the rates per ton.”

I suppose the double rates refer to domestic customers.

(Testimony of D. C. Norcross.)

Mr. McCUTCHEN.—And I suppose you will admit that the report was read to the stockholders in full?

Mr. ROCHE.—I understand that it was, and I understand that among the stockholders were practically all of the defendants.

(The document is here marked “United States Exhibit No. 98.”)

(There was here read in evidence an extract from a special meeting of the board of directors of the Western Fuel Company—page 17 of minute-book 2,—for May 16, 1907, showing James B. Smith, among other directors, present and containing the following statement: “Statements for the quarter ending March 31, 1907, showing the results of the business for that period were submitted and on motion were ordered placed on file”; also an extract from the special meeting of the board of directors of the Western Fuel Company for February 4, 1905, page 31, of the minute-book 2, showing James B. Smith, among other directors, present and containing the following statement: [144—90] “The President submitted the annual report of the President to the stockholders of the company for the fiscal year ending July 31, 1907; which was duly adopted and, on motion, was ordered submitted to the stockholders—said annual statement for said year 1907 was introduced in evidence as “United States Exhibit Number 99,” and it was conceded by the defendants that that report was read to the stockholders’ meeting of that year.)

(There were here read in evidence extracts from

(Testimony of D. C. Norcross.)

the minutes of regular monthly and special meetings of the board of directors of the Western Fuel Company for the dates below specified showing James B. Smith, among other directors, to have been present at each said meeting and showing also in the language below quoted the adoption and filing of certain monthly statements:

April 15, 1908. (Special meeting.)

“February monthly statements were submitted and, on motion \* \* \* they were ordered placed on file.”

May 1, 1908. (Regular monthly meeting.)

“Statements and balance sheet for the month of March were submitted and, on motion, were ordered placed on file.”

June 12, 1908. (Regular monthly meeting.)

“The regular monthly statements and balance sheet for the month of April were submitted and, on motion duly seconded, were ordered placed on file.”

June 25, 1908. (Regular monthly meeting.)

“Statements for the month of May were submitted and ordered placed on file.” [145—91]

July 22, 1908. (Regular monthly meeting.)

“Statements for the month of June, 1908, were submitted and on motion were ordered placed on file.”

September 10, 1908. (Special meeting.)

“Statements with balance sheets showing the results of the company’s business to July

(Testimony of D. C. Norcross.)

31, 1908, were submitted and on motion  
\* \* \* were accepted and ordered placed  
on file.”

September 30, 1908. (Special meeting.)

“Statements for the month of August were  
submitted and \* \* \* were accepted and  
ordered placed on file.”

November 4, 1908. (Special meeting.)

“Statements for the month of September  
were submitted and \* \* \* were accepted  
and ordered placed on file.”

(At this point the following proceedings were had:

“Mr. McCUTCHEN.—I suppose it may be under-  
stood as we go along, Mr. Roche, that none of the  
statements that you have heretofore offered are the  
business and financial statements referred to in  
these minutes?

Mr. ROCHE.—Of course not, I cannot admit that  
may it please the Court, because in the first [146—  
92] place, our information is otherwise, and in  
the second place, I am satisfied that counsel, upon  
investigation, will himself concede that to be true.  
We have put in here not only the financial statement,  
but likewise the monthly statements showing the  
monthly balance upon hand. In any event, some  
of these exhibits must have been the exhibits which  
were submitted to the board of directors, and accord-  
ing to the minutes it would apparently appear that  
all these statements were submitted to the board of  
directors.

“Mr. McCUTCHEN.—You do not claim that these

(Testimony of D. C. Norcross.)

statements are the business and financial statements referred to in these minutes?

Mr. ROCHE.—Certainly, we do.”)

December 7, 1908. (Special meeting.)

“Statements showing the results of the company’s business for the month of October were submitted and, on motion \* \* \* were accepted and ordered placed on file.”

February 18, 1909. (Special meeting.)

“The President then read the directors’ annual report to the stockholders for the year ending December 31, 1908, which was unanimously approved and \* \* \* was ordered placed on record and to be submitted to the stockholders at the annual meeting to be held Tuesday, February 23, 1909.”

February 23, 1909. (This was a stockholders’ and not a directors’ meeting.) [147—93]

“The President read the directors’ 6th annual report to the stockholders which, on motion \* \* \* was accepted and ordered placed on file.”

March 10, 1909. (Special meeting.)

“Statements showing the result of the company’s business for the month of January were submitted and ordered placed on file.”

March 20, 1909. (Special meeting.)

“Statements for the month of February were submitted and on motion \* \* \* were ordered placed on file.”



(Testimony of D. C. Norcross.)

April 29, 1909. (Special meeting.)

“Statements for the month of March, 1909, were submitted and \* \* \* were accepted and ordered placed on file.”

June 7, 1909. (Special meeting.)

“Statements for the month of April were submitted and ordered placed on file.”

July 14, 1909. (Special meeting.)

“Statements for the month of May, 1909, were submitted and \* \* \* accepted and ordered placed on file.”

August 3, 1909. (Special meeting.)

“Statements for the month of June, 1909, were submitted and \* \* \* accepted and ordered placed on file.”

September 27, 1909. (Special meeting.)

“Statements for the month of August were submitted and ordered placed on file.” [148

—94]

December 9, 1909. (Special meeting.)

“Statements for the month of October, 1909, were submitted and ordered placed on file.”

December 30, 1909. (Special meeting.)

“Statements for the month of November were submitted and ordered placed on file.”

February 1, 1910. (Special meeting.)

“Statements for the month of December were submitted and ordered placed on file.”

February 1, 1910. (This is a meeting of the stockholders and not of the directors.)

(Testimony of D. C. Norcross.)

(Here stipulated and agreed by counsel for the defendants that the prosecution might have portions of such further minutes of the meetings of the board of directors of the Western Fuel Company as they might desire to read into evidence, copied off by a stenographer and offered and read in evidence, such extracts to show the directors present and the statements adopted.)

D. C. NORCROSS was here recalled for further direct examination.

The monthly statements similar to those yesterday offered in evidence, but covering the period January 1, 1904, to April 1, 1906, were destroyed in the fire except perhaps the statement for March, 1906. The annual statements, however, are all in existence.

At this point the following proceedings were had:

“Mr. McCUTCHEN.—In that connection, would it not be appropriate that you have the witness explain what he means by monthly financial statements, so that the jury may have it in mind?

Mr. ROCHE.—We will go into that matter later. So [149—95] that there will be no question about our position, we intend to claim in the first place that the board of directors were charged with the knowledge of these records in the first place, and in the second place that the monthly statements that have been heretofore introduced in evidence are the monthly statements referred to in these minutes, and which were from time to time called to the attention of the board of directors.

Mr. McCUTCHEN.—I only suggested to you in

(Testimony of D. C. Norcross.)

order to clear any doubt on that subject, that you ask the witness, so that the jury might have it in mind as they went along. I am not asking what your claim is."

(Here stipulated that prosecution may offer in evidence extracts from the minutes of the stockholders of the Western Fuel Company for the meetings from and including the year 1904 to and including the year 1912.)

(The prosecution here read in evidence an extract from the meeting of the stockholders of March 11, 1904, as follows:)

"San Francisco, March 11, 1904. The monthly meeting of the directors of the Western Fuel Company was held at its office, 318 California street, April 11, 1904. Present: Messrs. John L. Howard, James B. Smith, Sidney V. Smith, and Joseph L. Schmitt. Absent: Mr. J. C. Wilson."

Mr. McCUTCHEN.—May we ask, for our information, whether you offer that as evidence of the formation of a conspiracy or as evidence of the execution of a conspiracy already formed?

Mr. ROCHE.—We offer it as a part of the conspiracy; in other words, we desire, may it please the Court, among other things to show motive, and we desire to show, may it please the [150—96] Court, one of the reasons why this conspiracy was formed, and one of the reasons why the conspiracy was called forward, was so that the profits resulting to these defendants as a result of that conspiracy could be collected and retained by them.

(Testimony of D. C. Norcross.)

“Mr. James B. Smith moved and Mr. J. L. Schmitt seconded, that dividend No. 4 of  $21\frac{1}{2}$  per cent on the issued capital stock of the company be declared.”

(Counsel for the prosecution here read in evidence extracts from the minute-books of the Western Fuel Company for meetings held on the dates below specified at each of which meetings James B. Smith was among the directors present and, unless otherwise indicated, voted for the dividends below specified, which dividends were declared upon the entire issued capital stock of the company:)

October 29, 1904	$21\frac{1}{2}\%$	Dividend No. 5
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(It was at this point stipulated that the capital stock of the Western Fuel Company was and is \$1,000,000.)

February 13, 1905	$21\frac{1}{2}\%$	Dividend No. 6
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May 5, 1905	$21\frac{1}{2}\%$	Dividend No. 7
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October 16, 1905	$21\frac{1}{2}\%$	Dividend No. 8
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December 15, 1905	$21\frac{1}{2}\%$	Dividend No. 9
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February 23, 1906	$21\frac{1}{2}\%$	Dividend No. 10
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(On motion, duly seconded, the following resolution was unanimously adopted: Whereas, the Western Fuel Company has invested a large amount of its net earnings in mine improvements and in the shares of companies whose products it controls; resolved, that in order to increase its [151—97] paid up capital to the amount of \$1,000,000 shares to the amount of 409 be disposed of to share-owners in the proportion of the present holdings, and at the rate of \$100 per share; that

(Testimony of D. C. Norcross.)

subscriptions for said allotment shall be payable not later than 28th February next, and that any shares not subscribed shall be sold to the share-owners making the highest bid at not less than \$100 a share.)

August 9, 1906.	21½%	Dividend No. 12.
December 21, 1906.	21½%	Dividend No. 13.
March 25, 1907.	21½%	Dividend No. 14.
May 16, 1907.	21½%	Dividend No. 15.
May 16, 1907.	21½%	Dividend No. 16.
September 6, 1907.	21½%	Dividend No. 17.
September 28, 1907.	21½%	Dividend No. 18.
March 30, 1909.	21½%	Dividend No. 19.

December 9, 1909. There being no declaration of dividend between March and December of 1909,—“It was resolved that a dividend of 21½% of the entire capital stock issued be and it is hereby declared and made payable on December 23, 1909.”

March 23, 1910.	21½%	Dividend No. 21.
June 28, 1910.	21½%	Dividend No. 22.

(Mr. James B. Smith was absent from this meeting.)

September 22, 1910.	21½%	Dividend No. 23.
December 21, 1910.	21½%	Dividend No. 24.

[152—98]

March 4, 1911.	21½%	Dividend Number 25.
June 12, 1911.	21½%	Dividend Number 26.
September 28, 1911.	21½%	Dividend Number 27.
November 29, 1911.	21½%	Dividend Number 28.
February 29, 1912.	21½%	Dividend Number 29.



(Testimony of D. C. Norcross.)

May 22. 1912. Concerning this meeting, the following extract from the minutes was read in evidence: "Directors present: Mr. John L. Howard, Presiding; Messrs. James B. Smith, Robert Bruce, J. R. Pringle, and Joseph L. Schmitt; Director Rob't Bruce moved the following: Resolved, that a dividend of five (5) per cent be declared and made payable June 27th, 1912, on the entire capital stock issued. After some discussion Director Bruce amended his resolution to read:

"That a regular dividend of two and one-half per cent and an extra dividend of two and one-half per cent on the entire capital stock issued be declared and made payable June 27, 1912."

After discussion director James B. Smith seconded the amended resolution, whereupon director Jos. L. Schmitt called for a roll-call. Directors Bruce and Smith voted yes; Directors Schmitt, Pringle and Howard voted no. Whereupon the Chair declared the resolution was not carried.

On motion of director Jos. L. Schmitt, seconded by director J. R. Pringle, the following resolution was unanimously adopted: Resolved— [153—99] That a dividend of two and one-half per cent ( $2\frac{1}{2}$ ) being dividend No. 30 on the entire capital stock issued be and hereby is declared and made payable on June 27th, 1912."

(Testimony of D. C. Norcross.)

June 27, 1912. "Mr. Bruce moved the following resolution: Resolved, that an extra dividend of two and one-half ( $2\frac{1}{2}$ ) per cent on the entire capital stock issued be declared and made payable immediately. Mr. James B. Smith seconded this resolution, whereupon Mr. Jos. L. Schmitt called for a vote. Directors Bruce and James B. Smith voted yes, and Directors Sidney V. Smith and Jos. L. Schmitt voted no.

The chair being called upon to vote asked for time to go into the condition of the company more fully.

On motion made and seconded an adjournment was taken to 11 A. M. on Friday, June 28th, 1912."

June 28, 1912. "The Chair explained the company's condition as he found it and the money requirements for the future and said that as the deciding vote for an extra dividend rested with him he would vote in the affirmative providing the motion made would be amended to read: [154—100]

'An interim dividend of  $2\frac{1}{2}$  payable on Aug. 1st or Aug. 15th.'

Director Bruce declined to amend the motion, and again offered the following:

'Resolved: That an extra dividend of two and one-half ( $2\frac{1}{2}\%$ ) per cent be and hereby is declared and made payable immediately.'

Director Sidney V. Smith seconded the

(Testimony of D. C. Norcross.)

resolution, whereupon Director Jos. L. Schmitt called for a vote. Directors Sidney V. Smith, Rob't Bruce and Jas. B. Smith voted yes. Directors Howard and Schmitt voted no.

The Chair declared that as a majority of the directors had voted in favor of the resolution it was duly carried.

September 26, 1912.  $2\frac{1}{2}\%$  Dividend No. 32.

November 29, 1912.  $2\frac{1}{2}\%$  Dividend No. 33.

December 27, 1912. "Directors present, Mr. John L. Howard, presiding: Messrs. James B. Smith, Joseph L. Schmitt, Robert Bruce and Sidney V. Smith.

Director Robert Bruce moved the following resolution: Resolved: that an extra dividend of  $2\frac{1}{2}$  per cent, dividend No. 34 be and hereby is declared and made payable on December 30th, 1912. Director Sidney V. Smith seconded this resolution, whereupon Director Schmitt called for a vote. On calling the roll all directors, with the exception of Director Schmitt voted 'yes'; Director Schmitt voted 'no'; whereupon the [155—101] Chair declared the resolution adopted."

February 4, 1913. "Directors present: Mr. John L. Howard, presiding; Joseph L. Schmitt, Sidney V. Smith and Robert Bruce; absent, Mr. James B. Smith.

Director Sidney V. Smith proposed the following resolution: Resolved, that a dividend

(Testimony of D. C. Norcross.)

of five dollars per share (Dividend No. 35) on the capital stock issued be and hereby is declared and made payable immediately. Further resolved, that a dividend of five dollars per share (Dividend No. 36) on the capital stock issued be and is hereby declared and made payable on February 28th, 1913.

Director Robert Bruce seconded the foregoing resolution, whereupon Director Schmitt called for a poll of the vote. All directors present voted in the affirmative except Director Schmitt, whereupon the Chair declared the motion carried.”

(Here stipulated and agreed by counsel for the defendants that the prosecution may hereafter direct attention to extracts from the minutes of the board of directors which have not already been read into evidence and likewise from the minutes of the stockholders and that such extracts may be considered as having been read and if necessary be read to the jury at the time.) [156—102]

BE IT REMEMBERED that thereupon the following testimony was given and the following proceedings were had:

“Mr. ROCHE.—Q. I direct your attention, Mr. Norcross, to an Annual Statement purporting to be the Annual Statement of the President of the corporation for the year 1909, and ask you if that is the statement. A. That is the statement all right.

\* \* \* \* \*

The figures were gone over by Mr. Howard before

(Testimony of D. C. Norcross.)

the statement was presented to the board.

Q. I want to direct your attention to an item appearing on the last page of this Annual Statement, as follows: 'By overrun, Australian coal, \$21,875.' To what does that refer?

A. Overrun of coal at the end of 1909.

Q. The Western Fuel Company during that year was, as it had been during prior years, buying Australian coal? A. Yes.

Q. And do you recall approximately the price paid by it for the Australian coal if bought during that year? A. About \$7.50 to \$8.00 a ton.

Q. In other words, the price varied from \$7.00 to \$8.00 per ton? A. Yes.

Q. Was that f. o. b. at the mine, or f. o. b. San Francisco?

A. F. o. b. San Francisco; it was as high as \$8.50 a ton, some of it.

Q. Do you recall that in quite a number of instances the Australian coal was purchased by you f. o. b. mine? [157—103] A. No.

Q. In other words, the vessels in which the Australian coal was imported to the port of San Francisco by the Western Fuel Company were not chartered by the Western Fuel Company?

A. No, we did not import it; we bought it from the importers; we bought it delivered here.

Q. So that so far as the Australian coal is concerned, you had nothing at all to do with the payment of the freight; is that right?

A. No, we had nothing to do with the freight.



(Testimony of D. C. Norcross.)

Q. This item of—

The COURT.—Q. Did you have to pay the duties?

A. No, we bought the coal freight and duty paid.

Mr. ROCHE.—Q. That is, you did not have to pay duty upon the Australian coal? A. No.

Q. That was paid by the Importer or the consignor, where you bought it f. o. b. San Francisco?

A. By the Consignee—the ship.

Q. As I understand your statement, the duty was paid by the Consignor—that is, the seller of the coal?

Mr. McCUTCHEN.—The Western Fuel Company was not the consignee. The consignor is the man who shipped it in Australia; the consignee is the man who brought it here and from him we bought it. He paid the duty.

Mr. ROCHE.—Q. Then your testimony would be that the coal was really bought at San Francisco?

A. That is right.

Q. In other words, the Western Fuel Company would engage to purchase coal from firms in San Francisco [158—104] which would purchase the coal and to whom the Australian coal had been consigned? A. That is correct.

Q. So the consignee would pay the import duty?

A. That is correct.

Q. It is also true, is it not, that the Western Fuel Company paid for that coal on what is known as the out-turn weight?

A. On the custom-house out-turn weight.

Q. That is also known as the out-turn weight, is it not? A. Yes.

(Testimony of D. C. Norcross.)

Q. If the out-turn weight was less than the invoice or bill of lading weight, the Western Fuel Company would pay only upon the out-turn weight?

A. That is all.

Q. And it is also true, is it not, in practically every instance the coal was weighed out of the ship upon the bunkers of the Western Fuel Company?

A. Yes.

Q. With one or two exceptions?

A. How is that—how did you put that?

Q. It was weighed by the Western Fuel Company and the Government weigher upon the Western Fuel scales? A. It was weighed by the Government—

Mr. McCUTCHEN.—Just a minute, I object to that, may it please the Court, as leading and suggestive. Mr. Roche suggests to the witness that the coal was weighed by the Western Fuel Company. The fact is it was weighed by the custom-house weigher and by nobody else.

Mr. ROCHE.—That statement is not exactly accurate, Mr. McCutchen, because it was weighed by both of [159—105] them.

The COURT.—Neither of these statements is evidence, however.

Mr. ROCHE.—Your Honor is correct about that.

Q. At what place would this Australian coal be discharged?

A. At the most convenient wharf, Vallejo street or Mission Street or Folsom Street or at Oakland.

Q. Would it be discharged at the wharves under the control of the Western Fuel Company?

(Testimony of D. C. Norcross.)

A. Yes.

Q. And would it be handled by Western Fuel employees?     A. Yes.

Q. And it would be weighed over the scales of the Western Fuel Company, would it not?     A. Yes.

Q. And at those scales would be a Government weigher and also an employee—a weigher of the Western Fuel Company     A. Yes.

Q. That is correct, too, is it not?

A. That is correct.

Q. The item to which I directed your attention a few moments ago is an item relating to the year 1909, 'by overrun, Australian coal, \$21,875.' I would like to have you explain that item.

A. It is the overrun of coal in excess of the quantity called for by the books to be on hand at that period; after taking stock we found we had that much excess over what our books called for.

Q. Your books called for the out-turn weight, did they not?

A. They called for the intake weight, less the out-turn, the balance.

Q. They called for the intake weight?

A. What we had paid for and put in our yards.  
[160—106]

Q. Let me get at that in another way; you testified a moment ago you paid for this coal—and when I say 'you' I mean the Western Fuel Company, upon the out-turn or ascertained weight; is that correct?

A. That is correct.

Q. The entries contained in your books showing

(Testimony of D. C. Norcross.)

the quantity of coal received and the amount paid for that coal would necessarily relate to the out-turn or ascertained weight; is not that correct?

A. The balance.

Q. What do you mean by the balance?

A. I mean that I charge up the out-turn weights of the vessels to our coal account, and I credit our coal account with the sales of coal from all sources and there is a balance on hand called for by the books; when we take an inventory we find we have that much of an excess.

Q. You mean for which you cannot account; is that correct?     A. Well, I don't know about that.

Q. Let me get at that another way so as to simplify it; suppose you imported from Australia 10,000 tons of coal at a certain value. I will modify or change that question a little; you have testified that you would purchase this Australian coal from San Francisco firms who would import it and to whom the coal could be consigned; that is correct, is it not?

A. Yes.

Q. And these boats would be discharged at the wharves of the Western Fuel Company?     A. Yes.

Q. If the out-turn weight of that coal; that is, the ascertained weight, the weight of the coal upon its discharge from the boat was 10,000 tons, your books would show that you received 10,000 tons of Australian coal, would they not?     A. Yes. [161—107]

Q. And if you paid \$8.00 a ton to the consignee, your vendor, for that coal, your books would show that for that 10,000 tons of Australian coal you paid \$80,000; that is correct, is it not?

(Testimony of D. C. Norcross.)

A. That is correct.

Q. Then if this item would apply to that situation it would indicate that at the end of the year you had \$21,875 more Australian coal on hand than the coal which you bought; is not that correct—either on hand or sold? A. Either on hand or sold, yes.

Q. This calculation is based upon the cost price of that coal to you? A. Yes.

Q. So that if the coal cost \$8.00 per ton and \$21,875 was divided by 8, you would have the quantity of coal on hand beyond the quantity of coal which your books showed you should have on hand; is not that correct?

A. That is correct.

Q. Or, in the event that the coal was sold, your books would show you sold that quantity of coal which your books would also show you did not purchase? A. That is right.

Q. In this particular instance, if this coal cost \$8.00, the maximum figure, the overage or overrun would be about 2,700 tons, would it not?

A. I think about that.

Mr. McCUTCHEN.—I think the witness suggested \$8.50.

Mr. ROCHE.—He said from \$7.00 to \$8.00.

A. I don't know what the average would be; that is what that would amount to, though, 2,700 tons.

Q. Approximately that? A. Yes.

Q. What was the Australian coal retailing for at that time?

Mr. McCUTCHEN.—I object to that as immaterial. [162—108]



(Testimony of D. C. Norcross.)

Mr. ROCHE.—I will withdraw the question.

Q. For what price were you selling Australian coal at that time?

Mr. McCUTCHEN.—I object to that as immaterial, irrelevant and incompetent, the selling price of coal has nothing to do with this conspiracy.

Mr. ROCHE.—I don't know whether your Honor desires to have the matter argued or not.

The COURT.—The objection is overruled.

Mr. McCUTCHEN.—We note an exception.

A. What year was that?

Mr. ROCHE.—That was 1909.

A. Either \$8.00 or \$9.00 a ton, I don't remember which.

Q. That is, sold by you?      A. Yes.

Q. That is, sold by you to the dealers, do you mean?      A. Yes.

\*      \*      \*      \*      \*      \*      \*      \*

Mr. ROCHE.—I suppose this entire document may be considered as having been read? We ask that it be marked as an exhibit.

(The document was here marked 'U. S. Exhibit No. 100.')

(The witness here identified the annual statement of the Western Fuel Company for the years 1908, 1910 and 1911, and 1905, and they were marked respectively as 'United States Exhibit 101, 102, 103, and 104.')

No annual statement was prepared for the year 1912. The annual statements were usually prepared in the latter part of January of the year succeeding

(Testimony of D. C. Norcross.)

that for which they were written, and they would be dated back to December [163—109] 31st.)

“Q. Mr. Norcross, drawing your attention for a moment again to some of the entries of overrun appearing upon the statements which were introduced in evidence yesterday afternoon and to which your attention was then directed, it is true, is it not, that upon the records of the company, or rather, upon these monthly statements this excess coal to which you refer, that is, the overrun ex-barges would be recorded as so much coal received?

Mr. McCUTCHEN.—What statements do you refer to now?

Mr. ROCHE.—The statements introduced yesterday?

A. On these coal statements?

Q. Yes.      A. Yes.

Q. In other words, upon the books of the company the excess coal would appear as so much coal received by the company?      A. Yes.

Q. It is true, is it not, that when that coal was sold, the price which the company received for that coal would be included in the aggregate amount of profits earned by the company?      A. Yes.

Q. And that system has been pursued throughout the entire conduct of the business of the Western Fuel Company?      A. Yes, it has.”

The boats that brought Nanaimo coal for us to San Francisco were chartered by the Western Fuel Company with the exception of the “Weyfield” which was owned by the company. It was lost, I think, in

(Testimony of D. C. Norcross.)

1905 in the Japanese war.

With reference to the charter of these colliers [164—110] bringing coal from Nanaimo, we sometimes paid so much per ton and sometimes would charter the colliers by the month. There are no flat trip charters. As for our usual course, I would say that we had our monthly charter boats—yearly charters they were—but if we needed extra tonnage we would hire it at so much per ton. And as for the compensation for a boat that we chartered for a year, it would be just a flat sum, so much per month. Where the compensation was paid by tonnage the amount of such compensation was determined by the out-turn or ascertained weight and not by the invoice or bill of lading weight.

During the year 1912 the following coal companies, in addition to the Western Fuel Company, were importers of coal in San Francisco: Hind, Rolph & Co., J. J. Moore & Co., Mitsue & Company and G. W. McNear. Those companies simply purchased coal and brought it into the port here and sold it in cargo. Ordinarily they sold these cargoes to the Western Fuel Company. The Pacific Fuel Company in 1912 was selling imported coal to the dealers. It was the only company in San Francisco selling foreign coal to dealers outside of the Western Fuel Company in 1912 that I can think of. The volume of business done by the Pacific Fuel Company in imported coal is small in comparison with that done by the Western Fuel Company.

I remember that one of our barges sank in the bay

(Testimony of D. C. Norcross.)

but I do not remember whether or not it was the "Melrose." I do not recall the name. I remember that whatever barge it was that sank had coal in it. That was 6 or 8 years ago. [165—111]

(The witness here promised during the noon recess to prepare a list of the stockholders of the Western Fuel Company, together with the number of shares of stock owned by each of them on the 1st of January, 1904, on the 1st of April, 1906, and on the 31st of December, 1913.)

Mr. ROCHE.—"These statements which you produced here a few minutes ago are likewise statements showing the monthly sales of coals of the Western Fuel Company; isn't that correct?"

A. They are summaries of the monthly sales.

Q. Summaries of the monthly sales. And they cover both the San Francisco depot sales, as well as the Oakland Depot: Is that correct?

A. Yes, that is correct.

Q. In other words, they show all coals sold by the Western Fuel Company, including, of course, all foreign coals, between the first day of April, 1906, and the 31st day of December, 1912. A. They do.

Q. And, therefore, of course, likewise show all coal sold by the Western Fuel Company in the state of California during that period of time? A. Yes.

Q. Including all foreign coal? A. Yes.

Mr. ROCHE.—We offer these in evidence, may it please the Court. I suppose they might as well be marked as one exhibit. I am going to add to them a few exhibits, two or three statements.

(Testimony of D. C. Norcross.)

(The papers are marked "Government's Exhibit 105.")

Mr. McCUTCHEN.—Do we understand that you propose to offer testimony later on to connect the defendants with these particular statements?

Mr. ROCHE.—These particular statements, of course, are put in for what they are worth; and we intend to indulge, [166—112] if necessary, in any legitimate inference that can be deduced from these statements and what they purport to show. They are introduced at the present time for the purpose of hereafter placing a witness upon the stand to testify to calculations based upon these statements. I understood yesterday that there was no objection urged to any of these documents upon the ground that they were not the best evidence.

Mr. McCUTCHEN.—We are not making that objection now. But we would like to know now whether you offer them as evidence of the formation of a conspiracy, or as evidence of the execution of the conspiracy.

Mr. ROCHE.—In the first place, the question is not a proper question to put to us, because these statements, no objection having been made to them upon the ground that they are not primary evidence, if admitted will naturally demonstrate the quantity of coal sold by the Western Fuel Company, including foreign coal between the first day of April, 1906, and the 31st day of December, 1912. Now, then, we already have in evidence the quantity of coal actually imported by the Western Fuel Company, and, of



(Testimony of D. C. Norcross.)

course, deducting the quantity of coal imported by the Western Fuel Company from the quantity of coal sold by them and on hand December 31, 1912, will likewise demonstrate the quantity of coal for which they cannot account excepting upon the theory that that coal constitutes overage, and for that purpose, among others, these documents are offered.

Mr. McCUTCHEN.—That would not make these statements evidence against these defendants, if the defendants were not informed of the existence of the statements. We object to them upon that ground.

The COURT.—The objection is overruled.  
[167—113]

Mr. ROCHE.—Q. I direct your attention to one of these statements, being a summary or abstract of July, 1910, upon which certain writing appears, explanatory of some of the figures. In whose handwriting is that writing in red ink?

A. That is my bookkeeper's, Martin.

Q. Who compiled the statement. Now, upon one of these statements appears 'Stock in Wellington shows apparent overrun of over 800 up to sales reports including August 6.' That overrun would be explained by you, would it not, in the same manner in which you have explained these other accounts, in which you have explained the overrun?

A. I don't know. There might have been a shortage on something else. This is confused with the Australian coal; 600 tons he has transferred to Australian.

Q. That is, there was an average there of 800 tons?

(Testimony of D. C. Norcross.)

A. Offset by a shortage, probably, in another one. Coals get confused.

Q. Isn't it a fact that a part of this tonnage was added to a different kind of coal and a part added to another kind of coal and simply transferred over to the account of the other coal?

A. This is not an overage. It is simply taken from one kind of coal and merely transferred over to another coal. The Wellington showed an overrun of that much. The Australian might have been short that much.

Q. You have not any independent recollection on that subject?

A. No recollection on that subject.

Q. Let me direct your attention to one other statement, the statement for the month of November, 1910, coal statement, Oakland bunker, apparent overrun on Wellington, [168—114] 364 tons 2200 pounds. Transferred to Australian at \$7.88, the price received for Wellington at the bunkers \$2876.06?

A. The same idea. A transfer of one coal to another; no particular overage.

Q. You cannot state, of course, whether there was any shortage or overage in the Australian coal at that time, at all?

A. I cannot tell more than that statement shows right there."

BE IT REMEMBERED that thereupon the following testimony was given and that the following proceedings occurred:

(Testimony of D. C. Norcross.)

Q. Now, I direct your attention, Mr. Norcross, to what is entitled "Daily Journal, 1904," and ask you to look at that book and state what that book is.

A. That is Mr. Mills' memorandum book at the dock.

Q. That book was kept by Mr. Mills, the dock superintendent, is that correct, at the dock?

A. Yes.

Q. Will you just look at the book and testify, if you can, in whose handwriting the entries are in the book, or practically all of the entries?

A. As far as I can see, they are practically all Mills'; there is some other handwriting.

Q. That book, for instance, was kept by Mr. Mills, himself, and I suppose the entries were made by him, himself, but occasionally, when he was absent, the entries would be made by some other person; is that it?

A. That is correct.

Q. But the book was kept under his direction and supervision?     A. Yes. [169—115]

Q. You, of course, have seen this book before, have you?

A. I have seen it since the investigation began.

Q. Did you ever see it before this investigation was begun?     A. I can't remember.

Q. You, of course, can understand the entries kept in this book, can you not?     A. No, I can't.

Q. You say that you can't?     A. No.

Q. That is, you can't explain these entries?

A. No, I can't do that.

Q. Well, do you mean to say, Mr. Norcross, as

(Testimony of D. C. Norcross.)

secretary of the Western Fuel Company, that you are not familiar with what these items refer to?

A. I am familiar with what they refer to, yes, but as far as explaining this book, though, I can't do it. I never have seen them, and never have any interest in them; I don't know anything about them.

Q. Take this first entry, you are a bookkeeper, are you not, Mr. Norcross, or have you ever been a bookkeeper?     A. Yes.

Q. And you are thoroughly familiar with the system of keeping books?     A. I think I am.

Q. And have been for years?     A. I have.

Q. And in fact, you have supervision and control over the books of the Western Fuel Company, have you not, as secretary?     A. Yes.

Q. I direct your attention to the first entry here, appearing, "January 2, 1904," commencing with "Ex-'Comanche' account Oakland bunkers," ending with "over [170—116] 50—735." I will ask you if you don't know that that tower refers to 50 tons 735 pounds?     A. That is right.

Q. That is correct?     A. Yes.

Q. I would like to have you take that one item, or rather these items appearing under Friday, January 2, 1904, between the first item which appears here, Ex-'Comanche' account Oakland bunkers, over 50 tons 735 pounds" and explain that entry, if you can, to the jury?

A. There are three or four barges in here to begin with.

Q. I understand that.

(Testimony of D. C. Norcross.)

A. Several. Friday, January 2, Ex-“Comanche” account, Oakland bunkers.

Q. Now, what is Ex-“Comanche”? Is it a barge?

A. A barge. “Comanche” is a barge, yes. I am stuck on the start, I cannot explain.

Q. The “Comanche” is a barge owned and controlled by the Western Fuel Company on that date; is that true? A. That is true.

Q. Now what does the next item mean?

Mr. McCUTCHEN.—One moment. This book has not been offered in evidence yet.

Mr. ROCHE.—That, of course, is true.

Mr. McCUTCHEN.—It does not seem proper to ask the witness to explain a record that is not in evidence.

Mr. ROCHE.—This book, as you have already testified, was kept by Mr. Mills, one of the defendants in this case, and your dock superintendent?

A. Yes.

Q. And it was kept by him daily, was it not?

A. I presume so.

Mr. McCUTCHEN.—If the witness knows. Does he know anything further than that is Mills’ handwriting?

A. I don’t know. [171—117]

Mr. ROCHE.—Q. You have already testified that all of the writing, here, was in the handwriting of Mr. Mills?

A. No, I said there was some other writing.

Q. Practically all, that is correct, is it not?

A. Yes.



(Testimony of D. C. Norcross.)

Q. It is substantially all in the handwriting of Mr. Mills?     A. Yes.

Q. Do I understand you to say that you don't know that these entries were made on the particular day upon which they appear to have been made?

A. I don't know anything about it.

Mr. ROCHE.—Are you going to object to the introduction in evidence of these books on that ground, Mr. McCutchen?

Mr. McCUTCHEN.—Upon what ground?

Mr. ROCHE.—On the ground that no evidence has been introduced showing that the entries were made at the time that they purport to have been made.

Mr. McCUTCHEN.—I don't know what objection we may make until you offer the books.

Mr. ROCHE.—Q. Do I understand you to say, Mr. Norcross, that the first time you saw these books was after this investigation commenced?

A. To the best of my recollection, it is.

Q. Is it your testimony that before that time you did not know that Mr. Mills was keeping, or was in the habit of keeping any books of this kind?

A. I did not say that.

Q. I am asking you.

A. I presume he kept some.

Q. What knowledge, if any, did you have upon that subject?

A. I got reports from him. What records he copied them from or made them from I know nothing about, I didn't care. [172—118]

Q. Reports were received in your office, were they

(Testimony of D. C. Norcross.)

not, daily, showing the coal received and coal—

Mr. McCUTCHEN.—(Intg.) I object to that as calling for the contents of a written instrument, if it was a written report.

Mr. ROCHE.—Q. Did you receive any reports daily showing coal imported or coal discharged from the boats and received by the Western Fuel Company and likewise coal sold?

A. We did.

Mr. McCUTCHEN.—Do you mean a written report?

Mr. ROCHE.—I mean a written report.

Mr. McCUTCHEN.—I object to that as calling for the contents of a written instrument.

The COURT.—The objection is overruled.

A. We did.

Mr. ROCHE.—Q. From whom did you receive those reports?

A. Some from Mills and some from Mr. Mayer and some from others.

Q. Mr. Mills, from whom you received some of these reports, was your dock superintendent, and is the Mr. Mills in whose handwriting most of these entries appear; is that correct?

A. That is correct.

Q. Did you ever make any investigation prior to the date upon which the Grand Jury took up this particular matter, to ascertain what record was kept or were being kept by Mr. Mills upon the dock?

A. No.

Q. Did you ever see any of those reports? Did

(Testimony of D. C. Norcross.)

you ever see this book in particular prior to some-time during the year 1912?

A. I might have seen it, I don't recall it.

Q. That is, you have no recollection upon the subject [173—119] at all?

A. No. I don't remember having looked at the books for any purpose.

Q. Do you know of your own knowledge that these records do show the coal discharged from the coal-bunkers, among other things, the coal discharged from the offshore bunkers onto barges owned and controlled by the Western Fuel Company, and subsequently discharged from the barges?

Mr. McCUTCHEN.—I submit that the witness has already said that he had never seen the records, and didn't know anything about them; didn't know they were being kept.

The COURT.—Answer the question.

A. No, I don't know of my own knowledge.

Mr. ROCHE.—Q. Did you ever have any talk or conversation with the defendant, Mills, regarding the entries contained in this book at any time?

A. I think I have since the investigation begun.

Q. When did you have such a conversation with the defendant, Mills?

A. Any time within the last ten months.

Q. Did you have any conversation with him relating to the contents of this diary and what these items purported to be?

A. I don't know whether I spoke to him about that particular book or any particular book. I

(Testimony of D. C. Norcross.)

asked him some questions about why he made these entries.

Q. Did you ask the defendant, Mills, by whom the entries in all of these diaries, one of which I have already directed your attention to, and the others of which are now in front of me, and relating to each year since 1904 to and including 1912, were made?

[174—120] A. I don't think I did.

Q. Did you ask him to explain any entries appearing in any one of those books? A. No.

Q. Did you ask him at any time the purpose for which the entries were made, or any of these entries?

A. I asked him why he made them.

Q. What, if anything, did he say?

A. So he could get the deliveries of the coal out of his barges.

Q. Was that the only explanation which he made?

A. Well, I don't remember him saying much more than that.

Q. Did he also tell you that the entries disclosed the amount of coal delivered from the offshore bunker to the barge? A. No.

Q. Or from the barge to any of the boats which were coaled with coal previously laden upon the barge?

A. No, I was not talking about that with him.

Q. Did he tell you that the statements forwarded by him to your office from time to time, showing coal discharged into the barges, and subsequently laden from the barges onto boats supplied with coal

(Testimony of D. C. Norcross.)

for fuel purposes were based upon the figures and calculations contained in this book and other books similar in kind kept by him?

A. He made no statement of that kind to me, no.

Mr. McCUTCHEN.—If you propose to show, if you state that you intend to show that any of these defendants other than Mr. Mills ever saw these books, or heard of them during any of the time covered by your indictment, we will make no objection to your preliminary offer of them. [175—121]

Mr. ROCHE.—Counsel certainly understands that we desire to put these books in evidence as books of original entry for the purpose of showing the weight of the coal as it was discharged from the offshore bunker, and the weight of the coal as determined by the Western Fuel Company at the time it was laden from the barges to the boats which were coaled with coal previously laden upon the barge; that is the purpose for which we intend to use this book and those books. Of course, we will simply have to withdraw this witness and put another witness on to prove the entries before we can put the book in evidence.

Q. As secretary of the Western Fuel Company, Mr. Norcross, of course you have complete supervision and control of all the records and books of the company? A. Yes.

Q. And these books were brought out here by you in pursuance of a subpoena served upon you?

A. Yes.

Q. How long has this book in particular and the



(Testimony of D. C. Norcross.)

other diaries similar in kind, covering the years from 1904 to and including 1912, been in your possession?

A. They have not been in my possession at all, except to take them from Mr. Mills' office to the Grand Jury room.

Q. Mr. Mills' office is located upon the Western Fuel docks at the Folsom Street dock? A. Yes.

Q. And these books were kept day by day in that office, is that correct?

Mr. McCUTCHEN.—The witness says he does not know.

Mr ROCHE.—Q. When you first saw these books, did you find them in your office?

A. In Mr. Mills' office.

Q. Mr. Mills' office? A. Yes.

Q. These records, then, are brought from Mr. Mills, who ever since 1903 has been the dock superintendent of the [176—122] Western Fuel Company? A. Yes, sir.

Q. And has had general supervision and control over the barges and the docks of the company, is that correct? A. That is correct.

Q. And the actual discharge from the offshore bunkers and from boats into barges, and thereafter from barges into other vessels? A. Yes.

Q. And sold by the Western Fuel Company to the owners of these other vessels; is that correct?

A. Yes.

The COURT.—We will take a recess, now, until two o'clock.

(Testimony of D. C. Norcross.)

AFTERNOON SESSION.

Mr. McCUTCHEN.—If your Honor please, with reference to the books which were called to the attention of the witness Norcross just before adjournment, and in order to facilitate the prosecution in laying the foundation for an offer of these books, we will admit that the entries in these books in the handwriting of the defendant Mills were made by him in the course of his employment with the Western Fuel Company.

Mr. ROCHE.—And that they were made upon the dates which they bear?

Mr. McCUTCHEN.—Yes, we will assume that to be true; yes, we will make that admission subject to correction.

Mr. ROCHE.—And will you also admit, Mr. McCutchen, that where the handwriting is not—

Mr. McCUTCHEN.—Pardon me for interrupting you, I think I understand what you have in mind. Subject to correction hereafter, we will admit that where entries are made in the [177—123] handwriting of any other person than Mr. Mills those entries were made by the person making them in the course of his employment with the Western Fuel Company.

Mr. ROCHE.—And upon the dates upon which they purport to have been made.

Mr. McCUTCHEN.—We don't know anything about that but we make that admission subject to correction.

Mr. ROCHE.—Then we offer in evidence at this

(Testimony of D. C. Norcross.)

time, may it please the Court, the diaries kept by the defendant Mills, the dock diaries kept by the defendant Mills, for the years 1905, 1906, 1907, 1908, 1909, 1910, 1911 and 1912.

Mr. McCUTCHEN.—Now, for the purpose of preserving a record—

Mr. ROCHE.—Just a minute, Mr. McCutchen; and also for the year 1904.

Mr. McCUTCHEN.—We object to these books upon the ground that the books and the entries in them as to all of the defendants, except possibly the defendant Mills, are hearsay and are not admissible, and that they are incompetent.

The COURT.—That may or may not be true at the present time. The objection, however, will be overruled and the books will be admitted.

Mr. McCUTCHEN.—We take an exception to that ruling. And now we make the same objection on behalf of all the defendants excepting the defendant Mills.

The COURT.—All the effect that this matter might have upon the other defendants will depend a great deal on whether or not a conspiracy is shown.

Mr. McCUTCHEN.—Yes.

Mr. ROCHE.—Of course, that is correct, may it please [178—124] the Court, that if we do not show a conspiracy among these defendants, that as to such defendant against whom we do not show a conspiracy the Government would not have made out a case. But the primary purpose for which the books are being offered at this time is for the pur-

(Testimony of D. C. Norcross.)

pose of showing the weight of the coal at the time the coal was laden on the barge, and likewise to show the weight of the coal at the time the coal was taken from the barge and laden on to the boats.

The COURT.—The objection is overruled.

Mr. McCUTCHEN.—And your Honor overrules the second objection also?

The COURT.—Yes.

Mr. McCUTCHEN.—We take an exception.

(The books were here marked “U. S. Exhibits 106 to 114, inclusive respectively.”)

(Stipulated by counsel for the defendants with reference to the entries in the dock diaries or journals kept by the defendant Mills “United States Exhibits 106 to 114” that the word “Ex” in front of the name of a barge means coal that came out of the offshore bunkers generally into the barge; and that the word “Ex” in connection with a steamer and generally appearing just in front of the name of the steamer as distinguished from the name of a barge, means coal coming out of such steamer. In other words, that “Ex” in front of the name of a barge means “into” and in front of the name of a steamer “out of.”)

(The attention of the witness is here directed to the first item contained in the dock diary or journal for 1904 and appearing under the date—Friday, January 2d.) [179—125]

“Mr. ROCHE.—Q. As a bookkeeper, Mr. Norcross, and it being admitted that the word “ex” in front of the word ‘Comanche’ means ‘into’ instead

(Testimony of D. C. Norcross.)

of taken out of, can you read that first item?

A. January, Friday 2d ex 'Comanche', acc. Oakland bunkers: Wallsend 751 tons; Anthracite screenings, 100 tons, 280 lbs. Total 851—280.

Ex-'Corsair': New 'Wellington', acc. 'Titania'; Voyage 125—let me ask you right here, what does that item?

A. I presume it means there 'ex Titania' into the 'Corsair' instead of 'Ex Corsair' acc. of Titania.'

Q. That is, the coal was taken out of the 'Titania' and put upon the barge?

A. That is what I presume he means. 'Acc. Titania, Voyage 125, 625 tons, 1084 lbs. Steamer Siberia, 815 tons, 1130 tons (lbs.) Track, 9 tons, 500. Total 824 tons, 1630 lbs. Balance, 26 tons, 890 lbs. That is under 'Comanche.' Under 'Corsair' it says: 'Ex Ludlow, New Wellington, acc. Titania; Voyage 125, 425 tons, 1444 lbs. Ex Nau- mania, Stanford Anthracite screenings—there is a word here that I cannot make out, maybe you can read it.

Q. No, I can't read it. Just read the rest of it.

A. 'Acc. Oakland bunkers'; then there is another word I can't make out, I think the word is 'special'; '162 tons, 630 lbs. Acc. William Tillie, 751 tons, 60 lbs. Acc. Pac. C. Co. 810, 890 lbs. Total, 1723 tons, 1580 lbs. 'Sierra', 842 tons, 305 lbs. 'Buford' 931 tons, 2010 lbs. Total 1774 tons, 75 lbs. Over, 50 tons, 735 lbs.'

Q. To what does 'over' refer?

A. To the quantity of coal delivered in excess of



(Testimony of D. C. Norcross.)

the amount he charged his barge with.

Q. To what particular barge does that item relate? [180—126] A. To the barge 'Nanaimo.'

Q. In other words, it means, does it not, 'Mr. Norcross, that 50 tons, 735 lbs, of coal were taken off the barge 'Nanaimo' in excess of the amount of coal that the books and records of the company show went into the barge?

Mr. STANLEY MOORE.—Well, I don't think it should be characterized as the books and records of the company.

Mr. ROCHE.—Very well, I will withdraw that question and put it in this way: Q. This record upon its face shows, does it not, the amount of coal that went into the barge? A. It is supposed to.

Q. It also shows what was done with the coal which thus went into that barge?

A. The coal that came out of the barge.

Q. The coal that came out of the barge; is not that correct? A. That is right.

Q. And this record shows upon its face that 50 tons, 735 lbs. more of coal came out of the barge than was put on to the barge?

A. More than he charged his barge with.

Q. Assuming these records to be correct, there apparently were 50 tons, and 735 lbs. more coal came off the barge than went onto it? A. Yes.

Q. You say you have glanced over these records?

A. Yes, very casually.

Q. The same explanation would really apply to practically all of these records, with the exception

(Testimony of D. C. Norcross.)

of the name of the barge, or the name of the ship, where there is an overage, as you have just given.

A. Practically the same.

Q. That is correct, is it not, Mr. Norcross?

A. Yes, unless there was a shortage in some of them. [181—127]

Q. Well, there are very few shortages in these books; that is true, is it not? A. There are some.

Q. Well, a fraction of one per cent?

A. I would not go that low; you have figured it down finer than I have. I notice upon the face of nearly all of these items, Mr. Norcross, is a large 'E' in red ink; what does that mean? A. I don't know.

Q. Does not that mean that that has been entered, and a record of those entries sent to the office?

A. I presume so; I presume it means that he has reported, that he has made his report for the barge.

Q. And that as soon as the report was made it would be checked off with the letter 'E'; is not that correct?

A. I presume that is his way of doing it to show that he has reported.

Q. And the office to which he reported was the office of the Western Fuel Company in which you were located as secretary. A. Yes.

Q. I direct your attention to some numbers appearing in red ink; let me see if there is one on that first entry; well, take the entry appearing on January 5th. The word 'E' appears with reference to

(Testimony of D. C. Norcross.)

these entries and also various numbers, 116, 119, in red ink; to what do those numbers relate, if you know?

A. Yes, sir, I believe they are presumed to be the reports he makes of his deliveries to different steamers; whenever he makes a delivery out of barges he sends a tag showing so much coal delivered ex-barge to the steamer, or wherever it may go.

Q. When coal is laden on a barge, either from a bunker or from any other source, is there any report sent to [182—128] the office of such quantity of coal?

A. Yes, it is included in the discharge report out of steamers, when we are showing a steamer discharged.

Q. That is, the quantity of coal laden into a barge is shown in connection with the reports sent to the office, showing the discharge of coal into boats, is that correct?

A. Out of the boats?

Q. Out of the boats? A. Yes.

Q. That is, you mean the boats in which the coal is imported into this port? A. Yes.

Q. And then when the coal is taken out of the barge a report is also sent to the office showing the exact quantity of coal taken out of the barge?

A. Yes.

Q. And those reports are sent to the office of the company in which you are located as secretary?

A. Yes.

Q. To whom are those reports given?

(Testimony of D. C. Norcross.)

A. They may be on file in the manager's office.

Q. And who is the manager?     A. Mr. Smith.

Q. The defendant, James B. Smith; is that correct?     A. Yes.

Q. How frequently do those reports come to your office?     A. Daily, I think.

Q. Are they turned over to Mr. Smith daily?

A. They are put on file in his room.

Q. What happens to them after they are put there on the file for some time?

A. Well, I presume they are looked at.

Q. Looked at by whom?

A. The bookkeeper uses them; Mr. Smith looks at them.

Q. Who looks at them?     A. Mr. Smith.

Q. You mean James B. Smith.

A. Yes. [183—129]

Q. This procedure to which you have just referred showing the coal laden upon the barge and also showing the coal taken off the barge has been sent to the office of the Western Fuel Company as indicated by you since the 1st day of January, 1904; is that correct?     A. Yes.

Q. That has been the system pursued by Mr. Mills, by the defendant Mills?

A. I think they have, right along.

Q. And the system of placing these reports in the office of the defendant James B. Smith has likewise been rigorously adhered to; is not that correct?

A. I believe so, yes.

Q. Have you any personal knowledge, Mr. Nor-

(Testimony of D. C. Norcross.)

cross, as to when these overages are computed, either overages or underages—shortages?

A. Computed where?

Q. At what particular time; that is, as to whether they are computed at the time there is a cleanup at the barge. A. I understand that is the way.

Q. What do you understand by the words 'cleanup of a barge'?

A. I mean whenever he has taken out the quantity that is in there; if he ever exceeds the amount he is debited with it is called a cleanup, as I understand it.

Q. At the time of a cleanup is all the coal taken out of a barge?

A. If I am talking from personal knowledge, Mr. Roche, I cannot tell you.

Q. Then I won't press that question if you don't know."

I knew of the existence of these overages in all the years between 1904 and 1913, and I learned of such overages at the time when they appeared. I first discussed overages with the defendant Howard in 1904, considering then the overage of the [184—130] year 1903. We treated overages in our discussion as overages in general, without reference to those in any particular place. It was just an overage on our total coal stock. I am not sure that I thus discussed overages with Mr. Howard every year. I suppose I talked with him about them four or five times. However, I undoubtedly considered overages with him in connection with the preparation of financial statements for presentation to the directors.



(Testimony of D. C. Norcross.)

If I found on taking an inventory that we had an excess of coal on hand, I would as a rule mention it to Mr. James B. Smith as well as to Mr. Howard. I suppose I discussed the subject of overages with Mr. Smith as often in general as I did with Mr. Howard, and probably at the same time. We treated the overages as general and relating to all departments. We did not segregate the overages. I may have had one conversation in 1908 or 1909 with the defendant Bruce upon the subject of overages, but I do not remember about it clearly. I cannot recall ever discussing overages with defendant, Sidney V. Smith. I do not think I ever had any conversation on the subject with the defendant Mills, and I never did with the defendant Edward J. Smith. I do not recall having any conversations with defendant Schmitt regarding overages before this investigation started.

The subject of overages was discussed by all the directors before this investigation started. A number of these discussions took place early in February when the investigation started. I never discussed overages with the defendant Mills or the defendant Mayer since this investigation started.

(Admitted by counsel for the defendants, subject to correction, that all the steamers hereinbefore mentioned by the witness Dickson as operated by the Pacific Mail Steamship [185—131] Company except the "Nile" and "Persia" are registered under the American laws.

"Mr. ROCHE.—Will you admit, Mr. McCutchen,

(Testimony of D. C. Norcross.)

that the records which I have in my hand now were produced here from the United States Customs House, and are the record entries showing the entry of the various boats indicated in the record upon which the Western Fuel Company imported some of these foreign coals into the port of San Francisco from Nanaimo and from other places indicated in these documents?

Mr. McCUTCHEN.—If you will state that as the fact we will make the admission, subject to correction.

Mr. ROCHE.—All right.

\* \* \* \* \*

Mr. SULLIVAN.—We will send you a copy of it this afternoon.

Mr. ROCHE.—I will read to the jury the first one here, the complete document, so that the jury can understand the situation.

\* \* \* \* \*

The first record, Mr. McCutchen, relates to the steamship 'Reidar,' bringing coal from Ladysmith and from Nanaimo to San Francisco. The first part of this document is an invoice from Ladysmith, dated March 24, 1906, invoice of coal consigned to the Western Fuel Company at San Francisco, for sale on account of, shipped by Wellington Colliery Company, limited, per steamer 'Reidar,' marks and numbers, 2115 tons coal, value \$4.00, amount \$8460; consular certificate \$2.50, total \$8462.50. In red ink, over the value of the coal, is written 'Bituminous, 415.' Then appears, '67 cents per ton,' indicating

(Testimony of D. C. Norcross.)

the duty to be paid per ton. In red ink, upon the face of this invoice appears 'April 10, 1906, merchandise as noted, amount \$8460. C. J. E. John T. Dare, Appr.' [186—132]

Date of entry March 29, 1906. No. of entry, 4369. I certify that this invoice was presented to me on entry San Francisco, March 29, 1906, G. P. Clough, Deputy Collector. U. S. Appraiser will examine at wharf before delivery.

On the back of that appears the following: 'Consular certificate. I, the undersigned, Consular Agent of the United States of America, do hereby certify that on this blank day of March 24, 1906, A. D. 189—, the invoice described in the indorsement hereof was produced to me by the signer of the annexed declaration. I do further certify that I am satisfied that the person making the declaration hereto annexed is the person he represents himself to be, and that the actual market value or wholesale price of the merchandise described in the said invoice in the principal markets of the country at the time of exportation is correct and true, excepting as noted by me upon said invoice, or respecting which I shall make special communication to the proper authorities.

Witness my hand and seal of office the day and year aforesaid. Henry G. Seaborn, Consular Agent of the United States of America.'

'Declaration of owner or his duly authorized agent covering goods shipped without sale.

I, the undersigned, do solemnly and truly declare that I am the agent of the merchandise in the within

(Testimony of D. C. Norcross.)

invoice mentioned and described; that the said invoice is in all respects correct, and was made at Ladysmith, whence said merchandise is to be exported to the United States of America; that said invoice contains the actual market value or wholesale price of the said merchandise at the date hereof in the principal markets of B. C.; that said actual market value is the price at which the merchandise [187—133] described in the invoice is freely offered for sale to all purchasers in said markets, and that it is the price which I would have received and was willing to receive for such merchandise sold in the ordinary course of trade in the usual wholesale quantities, and that it includes all charges thereon and the actual quantity thereof, and that no *different* invoice of the merchandise mentioned in the said invoice has been or will be furnished to anyone. I further declare that it is intended to make entry of said merchandise at the port of San Francisco, in the United States of America. Dated at Ladysmith, this March 24, 1906. F. W. Hawes, Agent' And endorsed: 'Not purchased by importer. Invoice No. 88, issued in *Triplicate Quaduplicate*.

American Consular Service at Chemainus, B. C. Date, Mar. 24, 1906; Consignor, Wellington Colliery Co., Ltd., Victoria, B. C. Consignee, Western Fuel Co., San Francisco.

Name of Vessel, 'S. S. Reidar'; port of shipment, Ladysmith; Port of arrival, San Francisco; Port of entry, San Francisco; Value, \$8462.50. Contents, Coal.'

(Testimony of D. C. Norcross.)

And another endorsement as follows: 'Custom-House indorsement, No. 4369. Importer, Western Fuel Company; Vessel, Reidar; From, Ladysmith; Arrived, Mar. 28, 1906. Kind of entry Deposit. Marks, quality and contents: 2115 tons Coal. March 29, 1906, P. M. Liquidated, April 12, 1906.'

Instead of reading the contents of the other invoice, Mr. McCutchen, I will simply refer to it.

This is the second invoice relating to that part of the cargo which was shipped from Nanaimo. The invoice is dated March 22, 1906. Invoice of coal to the Western Fuel Company at San Francisco, California; account of Western Fuel Company; [188—134] shipped by Western Fuel Company; account of Western Fuel Company; shipped by Western Fuel Company, Nanaimo, B. C., per Steamer 'Reidar.' The tonnage is 3686 tons of coal, at \$4.00, value \$14,744; consular invoice, \$2.50, making a total of \$14,746.50, upon which the tariff rate was 67 cents per ton. On the back of this invoice appears the Consular Certificate, the same in form as the Consular Certificate already read in evidence, and then a declaration of the owner, which is signed by the Western Fuel Company by D. M. McKay, Agent.

The other indorsements appearing on this invoice are substantially the same as were upon the invoice previously read excepting applying to this particular consignment of coal."

(Admitted by counsel for defendants that D. M. McKay was at the time the resident agent of the Western Fuel Company at Nanaimo, and, subject to



(Testimony of D. C. Norcross.)

correction, that in each of these invoices where they appear to have been signed before the Consular Agent by an individual who assumes to act for and (designates himself) as the agent of the Western Fuel Company, that he was, in fact, at the time the resident agent of said company.

“Mr. ROCHE.—Attached to this entry are two bills of lading, one from each one of these ports.

‘Voyage No. —.

Wellington Colliery Company, Limited; Wellington Coal; No. 4369. Ladysmith, B. C. March 24, 1906; shipped in good order by Wellington Colliery Company, Limited, on board the ‘S. S. Reidar,’ whereof C. Stangebye is Master and bound for San Francisco twenty one hundred & fifteen (2115) tons Wellington Lump coal, the dangers of fire and navigation excepted, consigned to Western Fuel Co. of San Francisco, Cal. [189—135] Cour. Stangebye, Master.’

The bill of lading from Nanaimo reads as follows:

‘No. 148. New Wellington Coal, 3686 tons. Total, 3686 tons. Shipped in good order and condition by the Western Fuel Company, on board the steamer called the ‘Reidar’ whereof Stangebye is Master, now lying at the port of Nanaimo, Vancouver Island and bound for San Francisco, Cal. Three thousand six hundred and eighty-six tons New Wellington Coal, being marked and numbered as in the margin are to be delivered in like order and condition at the Port of San Francisco, Cal., the dangers of the sea only excepted, unto Western Fuel Co., or to their

(Testimony of D. C. Norcross.)

assigns, they paying freight for said coal.

In witness whereof the Master or Purser of said vessel hath affirmed to Four Bills of Lading all of this tenor and date; one of which being accomplished, the others to stand void. Dated at Nanaimo, V. 1 the 22nd day of March, 1906. Ceaur Stangebye, Master.'

The next document I am reading into the records is the Consumption Entry to which the two bills of lading is attached.

'Consumption Entry. P. W. Bellingall, Custom-House Broker. Entry of Merchandise imported by Western Fuel Company in the Nor. Str. 'Reidar,' whereof Stangebye is Master, from Ladysmith, on March 28, 1906, San Francisco, March 29, 1906.

Invoice dated at Ladysmith, 2115 tons coal, 2115, \$8460. 3686 tons coal, 3686, \$14,744; Total, \$23,204. Total number tons of coal, 5801.'

The value is again repeated in another column.  
[190—136]

Mr. McCUTCHEN.—Mr. Roche, if you will simply state the substance of that, we will not make any objection.

Mr. ROCHE.—All right. The tonnage in another column here has been stricken out and in red ink are the figures 5811. I suppose that means the liquidated weight. Then underneath that appears, \$23,204, 5811 tons, 67 cents, \$3893.37. And then a

(Testimony of D. C. Norcross.)

stamp down in the corner reading as follows:

“Deposit \$3886.67

Duty” in red ink

“\$3893.37.”

and then underneath that in red ink: “U. S. 6.70. Western Fuel Company, Geo. H. Probasco, Atty.-in-Fact.”

Mr. McCUTCHEN.—Now, in that connection, Mr. Roche, will it be admitted that \$3,893.37 was paid to the Government when the ship arrived here and was entered for discharge?

Mr. ROCHE.—Yes, that was the deposit paid.

Mr. McCUTCHEN.—And that was paid on the assumption that the bill of lading weights were correct?

Mr. ROCHE.—Yes. There was a shortage there, there was 6.70 returned.

Attached to the Consumption Entry is the following:

“United States Customs Service. Manifest No. 4369. Return of coal measured and weighed from on board the ‘Reidar’ whereof blank is Master, from ‘Ladysmith.’ I suppose you will admit, Mr. McCutchen that Ladysmith was the last port from which she cleared?

Mr. McCUTCHEN.—Yes.

Mr. ROCHE.—‘To whom consigned as permitted, Western Fuel Co. 2115; 3686; total, 5801 tons coal. Excess 10 tons, 210 lbs.’

You will admit, Mr. McCutchen, that that means that [191—137] there were taken off the ship 10

(Testimony of D. C. Norcross.)

tons and 210 lbs. of coal in excess of the amount indicated on the invoices and the bills of lading.

Mr. McCUTCHEN.—Yes; that is, when the ship was weighed here it was found that she had more coal in her than was indicated by the bills of lading; and that then, in addition to the other amount, the Government was paid \$6.70.

Mr. ROCHE.—That is correct. And at the bottom of this document it says: 'Port of San Francisco, April 9, 1906, F. L. Wooster, Weigher.'

In some of these cases I understand, Mr. McCutchen, that an entry was made by a person who assumed, and apparently was, or at least assumed to be an agent of the Western Fuel Company. Will you admit that in each instance that the person by whom the entry was made, and who represented himself as the Agent of the Western Fuel Company was in fact that Agent and had authority to appear and make the entry on behalf of the Western Fuel Company?

Mr. McCUTCHEN.—Subject to correction we will make that admission.

Mr. ROCHE.—All right. I think we will have each year marked as a separate exhibit.

(Thereupon the documents were marked as follows:)

For the year 1906, 'U. S. Exhibit 115';

For the year 1907, 'U. S. Exhibit 116';

For the year 1908, 'U. S. Exhibit 117';

For the year 1909, 'U. S. Exhibit 118';

(Testimony of D. C. Norcross.)

For the year 1910, 'U. S. Exhibit 119';

For the year 1911, 'U. S. Exhibit 120';

For the year 1912, 'U. S. Exhibit 121.' "

[192—138]

\* \* \* \* \*

Mr. ROCHE.—Now, I have here the claims interposed against the Government by the owners of the boats which were coaled with coal imported by the Western Fuel Company and upon which it was claimed duty had been paid the United States Government by the Western Fuel Company. We desire to offer all of these claims in evidence for the year 1905.

Mr. STANLEY MOORE.—No objection, and so far as the signatures are concerned, so far as any officers of this company are concerned, it will be admitted that they are their genuine signatures.

Mr. ROCHE.—All right. The signatures of the officers are not upon these claims because the affidavit where a drawback is claimed is attached to the original entry, and they are already in evidence here.

Mr. STANLEY MOORE.—Oh, I didn't know that. The Pacific Mail Steamship Company, or any other steamship company interposed the claim because the money is payable to it, and I supposed it was on those affidavits as well.

Mr. ROCHE.—The affidavit upon which the duties are rebated or repaid to the claimant is the affidavit made by an official or a representative of the Western Fuel Company indicating in what boat the coal was imported into the United States and further as-



(Testimony of D. C. Norcross.)

serting that duty has been paid upon that coal.

Mr. KNIGHT.—Mr. ROCHE, those are produced from the custom-house, are they not?

Mr. ROCHE.—Certainly; these are original records.”

\* \* \* \* \* [193—139]

“Mr. ROCHE.—We will offer all of these claims as one exhibit.

Mr. STANLEY MOORE.—There is no objection. They may be considered as having been read.

Mr. STANLEY MOORE.—Yes, they may be considered as having been read.

Mr. ROCHE.—I just want to read to the jury one of the draw-back affidavits. You will admit, will you not, Mr. McCutchen—I think it is already covered by your former admission—that where the affidavit upon which the drawback is based and upon which the custom duty is refunded is made by a person who purports to represent the Western Fuel Company or by an agent of the Western Fuel Company, that he was in fact such agent and that he had authority to represent the Western Fuel Company?

Mr. STANLEY MOORE.—Certainly, we will make that admission.

Mr. ROCHE.—I desire to read to the jury just one of the drawback entries or claims. This is a claim, gentlemen, made by the Pacific Mail Steamship Company for the return to it of duty claimed to have been paid by the Western Fuel Company upon coal consigned to the Western Fuel Company and subsequently claimed to have been delivered upon the

(Testimony of D. C. Norcross.)

steamship "China" for fuel purposes.

"Pacific Mail Steamship Company. Certificate of delivery of imported merchandise. Port of San Francisco, Description of merchandise, Coal; By whom imported, Western Fuel Co.; Now imported, Nor. Str. 'Terje Viking.' When imported, July 5, 1906; Where imported, San Francisco; Whence imported, Ladysmith; Quantity, 3695 tons; value, \$14,780; Rate of duty paid, 67 cents; No. Entry, 8409. [194—140]

I, James B. Smith, Vice-President and a stockholder of the Western Fuel Company, do solemnly swear that the merchandise herein described was imported as herein stated; that the duties were paid thereon, as herein stated; that the duties were paid thereon, as herein shown, without allowance or deduction for damage or other cause, except as herein set forth, and that the said merchandise has been delivered to Pacific Mail Steamship Co., and that no other certificate of delivery covering the above merchandise has been issued by me. James B. Smith, Importer. Sworn to before me this August 6, 1906. George H. Probasco, Notary Public in and for the City and County of San Francisco, State of California. Commission expires April 11, 1909."

Also there is another certificate which was signed by John L. Howard, reading as follows: it describes Bituminous Coal imported by the Western Fuel Company by the Norwegian steamer "Terje Viking" on July 5, 1906, at San Francisco, imported from Nanaimo, 285 tons, and the rate of duty the same

(Testimony of D. C. Norcross.)

as before, 67 cents; and then the following affidavit:

“I, John L. Howard, President and a stockholder of the Western Fuel Company do solemnly swear that the merchandise herein described was imported as herein stated; that the duties were paid thereon, as herein shown, without allowance or reduction for damage or other cause, except as herein set forth, and that the said merchandise has been delivered to Roth, Blum & Co., and that no other certificate of delivery covering the above merchandise has been issued by me. John L. Howard, President, Importer. Sworn to before me this 21st day of August, 1906, George H. Probasco, Notary Public in and for the City and County of San Francisco, State of [195—141] California; Commission expires April 11, 1909.”

And there is also a certificate that 5743 tons were consigned to the Western Fuel Company at San Francisco, on the Steamship “Terje Viking” from Ladysmith, British Columbia, June 30, 1906. And the next document is the United States Customs Service blank, Manifest No. 8409; return of coal measured and weighed from on board the “Terje Viking,” from Ladysmith, consigned to the Western Fuel Company, showing a shortage of 139 tons, 1310 lbs.

And then the other part of the document is the paper that is called Consumption Entry, and that is in form similar to the one I read to you a little while ago.

And then next is the claim itself, and I will read that to you in full:

(Testimony of D. C. Norcross.)

“Pacific Mail Steamship Company. Entry of Coal for use on board Steam Vessels. Entry of coal intended to be shipped under official supervision by the Pacific Mail Steamship Company, and to be used for fuel on board the Am. Str. “China,” D. E. Frick, Master, a vessel propelled by steam, duly registered under the laws of the United States, and engaged in Foreign Trade, now in port.

Quantity.	Date of Information	Importing or Transporting Vessel.	Amount of Duty.
<del>2000</del> tons	July 5-06	Nor. Str. Teye	\$930 63
1389		Viken	—
			100

Entry No. 8409

C. L. B.

Vessel Cleared ——— for Hong Kong.

PACIFIC MAIL STEAMSHIP CO.

By J. S. MATTOCK, H.,

Attorney in Fact.

I do solemnly, sincerely and truly declare that the coal described in the within entry, and now at vessel is intended to be used for fuel on board the above-described vessel and not to be re-landed at any place or port within the United States, [196—142] and that all of said coal was duly imported and that the duties thereon were paid at the port of San Francisco on or about 5 day of July, 1906. J. S. Mattock, Port of San Francisco. Declared before me, this 9 day of July, 1906. T. J. Barry, A deputy collector.

Port of San Francisco, July 9, 1906. To the Surveyor of the Port: You will direct an inspector to superintend the transfer and lading of the coal de-

(Testimony of D. C. Norcross.)

scribed in the accompanying entry on board the steamer Am. Str. China and when such lading is completed to make due return to that effect. T. J. Barry, A Deputy Collector. P. W. Smith, Deputy Naval Officer.

Port of San Francisco, July 9, 1906. I have superintended the transfer and lading of the within described coal on board the Am. Str. China. John A. Ross, Inspector, F. L. Wooster, Weigher. Weight 1389. 267-2240 Tons Coal D. Vessel Cleared July 14-06. Cui July 25-06. A. J. P. E. A. W.

[Endorsed]: "Pacific Mail Steamship Co. 1906-1907. Debenture No. 16. Claimant Export Vessel Am. Str. China For Hong Kong. Date of Clearance July 14, 1906. Drawback \$930.63. No. To the District Inspector Chauncey M. St. John. July 9, 1906, 1:30 P. M. Mattoon & Company, Custom House Brokers, San Francisco."

(Admitted by the prosecution that the word "Inspector" means an inspector employed by the Treasury Department. Admitted also by the prosecution that a customs weigher also [197-143] signs the above document, but explained that he was not the person who discharged the coal; in other words, that the chief customs weigher who was supposed to be present at the time the coal was actually weighed when it was discharged from the barge into the boat has not signed this entry. Admitted also by counsel for defendants that each one of these entries refers



(Testimony of D. C. Norcross.)

to coal which was claimed by the Western Fuel Company to have been loaded upon boats belonging to the Pacific Mail Steamship Company.

Cross-examination by Mr. STANLEY MOORE.

\* \* \* \* \*

There is a sign of no admittance down at the Folsom Street bunkers. The purpose is to keep people off the superstructure. It is customary on many of these wharves around the city to have such signs.

The bunkers are open on top so that you can drop coal down into them from the cars. The cars run along the track to the place where you want to dump and you throw the sides open and let the coal run through into the bunkers. Imported coal is weighed upon a rising or up-beam. All coal imported by the Western Fuel Company comes in large consignments, 2,000 to 8,000 tons in a vessel. It is sold out, however, for the most part in 5 ton loads. Most of the coal sold by the Western Fuel Company is delivered over its wagon scale from the yard and bunkers. The greater percentage of coal coming here to the Western Fuel Company is thus sold in wagon-load lots. The coal thus sold is very carefully weighed on what you would call an even beam.

With reference to the coal that is sold to vessels [198—144] being delivered from barges to such vessels, the weighing is by tubs, whereas in unloading imported coal from the ships on the wharf the weighing is by cars. On the barges they average their weight by tubs. They are supposed to weigh

(Testimony of D. C. Norcross.)

one out of fifteen tubs, and to average the next fourteen on the weight of the first.

When I say that I regarded these barges as storage hulks—I mean that the barges in our eyes are simply yards—a place to put coal. If it should be more convenient to put coal into the barge for delivery to the steamers later on, we would put it there instead of storing it in the yard. The barges are regarded as constituting part and parcel of the company's premises, just as the bunker or the yard would be.

BE IT REMEMBERED that thereupon the following testimony was given and that the following proceedings occurred:

“Mr. STANLEY MOORE.—Q. Mr. Norcross, when was the first time that you ever heard anything about overages or overruns in the coal business?

A. In 1903, the latter part of 1903.

Q. In what connection did you hear about it at that time?

A. In connection with the coal that had been purchased from the Wilson Company and the Howard Company, which was subject to adjustment of payments on final out-turn of the coal.

Q. The Wilson Company was a company that had been in the coal business here for several years prior to that time? A. Yes.

Q. Do you recall whether at the time that you purchased their coal they had a considerable stock on hand? [199—145]

Mr. ROCHE.—One moment, may it please the Court. That is objected to upon the ground it is not

(Testimony of D. C. Norcross.)

proper cross-examination, and as immaterial.

Mr. MOORE.—The purpose of it was this,—he was asked, Mr. Norcross was, when he first heard about overruns. Now, I propose to show upon cross-examination, if I might be permitted to do so, that the first overrun that he heard about was not in connection with the business of the Western Fuel Company at all, but at the time they purchased certain coal, buying it upon book weights subject to adjustment on out-turn weights; when it was actually weighed, it came to his knowledge in that case. It is merely cross-examination as to when he first heard about overruns. I think that it is admissible upon cross-examination on this theory too, your Honor. It seems to me that this witness has been examined as if these overruns were a strange and novel thing and peculiar only to the business transacted by the Western Fuel Company and that some veil of secrecy seems to surround them, that as little was said concerning them as possible, as if they were treated as something strange and unusual; and it is to negative that idea or inference, if it is one which is claimed can be drawn legitimately from the direct examination, I would like to ask of this witness if he did not hear of overruns in connection with the business of other companies as well.

Mr. ROCHE.—The direct examination of this witness in so far as it relates to overruns related exclusively to the business done by the Western Fuel Company. We are not at this time trying any frauds committed by any other coal concern or companies in

(Testimony of D. C. Norcross.)

the State of California. If it becomes necessary to do so, of course we will do that at the proper [200—146] time. But counsel is now under the guise of cross-examination of this witness trying to ascertain from him what he heard concerning the accounts of other coal concerns doing business in San Francisco or elsewhere.

Mr. MOORE.—There has been, if your Honor please, an implication that the occurrence of an overrun constitutes fraud. It is to dissipate that very idea that I desire to cross-examine this witness not only with respect to these other two dealers. That I can do through the medium of cross-examination. But if an overrun constitutes fraud I can say now that every man in the coal business in the United States is also guilty of fraud from the mere fact and circumstance of an overrun. That is just what we object to in this case. If a man has 1.9 overrun or 2.3 overrun or 2.9 overrun, where he has handled two millions of tons of coal in large blocks and quantities, why, by whatever system of weighing, we claim that that does not necessarily and of itself show fraud; considering the proportion of the overrun and the bulk of the commodity handled, it is absolutely inconsistent with any such idea. Now, returning to the matter of cross-examination of this witness, if your Honor please, we submit that counsel himself in his remarks has just emphasized it, that they are trying to make something out of this overrun here, without telling the jury what the overrun amounts to or apparently being willing to disclose that informa-

(Testimony of D. C. Norcross.)

tion, and asking this witness when he first heard of overrun; and in that connection and upon cross-examination we desire to elicit the fact as to when indeed he did first hear of an overrun.

The COURT.—The overrun as disclosed by these reports and books? [201—147]

Mr. ROCHE.—No.

Mr. STANLEY MOORE.—No, he was asked the question—

The COURT.—The objection will be sustained.

Mr. MOORE.—Exception.

The Western Fuel Company first came into possession of the Folsom Street bunkers July 19, 1904. The scale-house was in place, as it now stands, at that time. No change has been made in the bunkers. They were open then as they are now. The only change done there that I can recall is a change in the system of handling the cars from an overhead trolley to a third rail, a mere change in the motive power for the propulsion of the cars. So far as I know, the girders, foundations and substructures upon which the office rests are just the same now as they were when we took over the properties. There may, of course, have been some minor repairs connected with the ordinary up-keep of the business. Those bunkers on Folsom Street have been constructed to my recollection since 1895. In other words, they were there approximately ten years before the Western Fuel Company ever came into possession of them.

BE IT REMEMBERED that thereupon the fol-



(Testimony of D. C. Norcross.)

lowing testimony was given and the following proceedings were had:

“Q. Now, Mr. Norcross, I want to ask you some questions with respect to the dividends that have been paid by this company; and first I want to ask you what is the grand average of dividends that have been paid by the company per year?

A. Slightly in excess of 9 per cent.; just a fraction over 9 per cent. on the capital stock issued.

Q. Slightly in excess of 9 per cent?      A. Yes.

Q. In that connection I want to ask of you the further fact whether or not the main business of this company consists [202—148] of the operation of mines and the selling of their output?

Mr. ROCHE.—One moment, may it please the Court; we object to the question as not proper cross-examination. Now, I am perfectly willing, if counsel wants to go into this examination as part of his case in chief, at this time, with the witness upon the stand, so that we may have an opportunity to cross-examine him instead of conducting a mere redirect examination. But this witness' attention upon direct examination was not in any wise directed to any dividends declared upon the company's property; his attention was directed to the minutes; he identified the minutes or testified that the minutes were correct, and the minutes themselves indicated the dividends declared and the percentage of those dividends, some of which amounted to \$10 a month—of those introduced in evidence one of them amounted to \$10 a month.

(Testimony of D. C. Norcross.)

The COURT.—The objection will be overruled.

Mr. STANLEY MOORE.—Read the question.

(Last question repeated by the reporter.)

A. It does.

Q. What is the fact with respect to mining property, as to whether or not there is a depletion of the substance in any business that mainly derives its income from the operation of mines?

Mr. ROCHE.—May it please the Court we make the same objection, and upon the further ground it calls for the conclusion of the witness.

The COURT.—The objection will be sustained. The record does not show that he has any special knowledge in that regard. Everyone knows that if you take coal out of a mine there is that much gone from it, if that is what you mean by [203—149] it.

Mr. STANLEY MOORE.—Perhaps that is a matter of common knowledge, not subject to testimony.

Q. Mr. Norcross, if the company's business was considered right back to its beginning, what do I understand you to say would be the average of dividends or income that has been received from it?

Mr. ROCHE.—Now, just one moment, may it please the Court, that question is objected to upon the ground that it directs the witness's attention to a date anterior to the first day of January, 1904.

The COURT.—The objection will be sustained.

Mr. MOORE.—Note an exception.

Q. Going back then to the first day of January, 1904, Mr. Norcross, what would be the average of the

(Testimony of D. C. Norcross.)

dividends declared as considered or dividing it into years?

Mr. ROCHE.—That is, you mean since January 1, 1904?

Mr. STANLEY MOORE.—Yes, I am now asking since January 1st, 1904.

A. May I look at the Dividend Book?

Mr. ROCHE.—Certainly.

The WITNESS.—Mr. Moore, I am ready to answer that question without the dividend book.

Mr. STANLEY MOORE.—Q. All right.

A.  $9\frac{1}{4}$  per cent.

Q. How much? A.  $9\frac{1}{4}$  per cent.

Q.  $9\frac{1}{4}$  per cent, considering the period back to January 1, 1904? A. Yes.

The COURT.—Q. Does that mean that it averages that much?

A. Yes, for the ten years of that period  $9\frac{1}{4}$  per cent.” [204—150]

With reference to the extract which was read here by Mr. Roche from the annual statement of the Western Fuel Company for the year 1906, stating that in that year there has been a veritable coal famine and that the company had had calls upon it at a very inopportune time by companies that had bunkering contracts with it, I would state that the bunkering contracts referred to were those made early in the year, or the preceding year with foreign ship owners for bunkering their vessels arriving at Puget Sound and British Columbia ports. In other words, those bunkering contracts had reference to

(Testimony of D. C. Norcross.)

foreign companies with whom contracts had been made in the previous year to supply their vessels with coal. The portion of that annual statement referring to the tying up of operations in Wyoming, Montana, Utah and Australia simply meant that there was a strike in those places and they could not get cars to ship coal to this market:

“Q. Now, do you recall as to what if anything was done by other companies owning mines in British Columbia, with respect to their bunker contracts?”

Mr. ROCHE.—May it please the Court we object to that as not proper cross-examination, and as being immaterial.

The COURT.—The objection will be sustained.

Mr. MOORE.—Exception.”

The overage which I stated yesterday I regard as all one overage is estimated regardless of the weights which Mr. Mills charges himself with as going into the barges. I paid no attention to such weights. As long as coal was in the barges it was company coal regarded as in storage. The title of the coal did not change when it went into the barges. The basis or sense of the figures upon which the overage that I mentioned [205—151] is ascertained is this:

“We take the total amount of coal charged to our coal account as weighed in by the Government—deduct from it the sales, and we should have a balance of so much on hand; we would take an inventory of the stock on hand and in all storage places, including the barges, and any difference would be taken up for or against—the overage would be taken up and



(Testimony of D. C. Norcross.)

charged into the coal account.”

If I were going to figure, therefore, on the overage of the Western Fuel Company today, I would make an inventory of what was actually estimated to be in the yards and in the barges and regard it all as company coal, then I would add up the custom-house weights for the coal that had been received throughout the period to which the inventory relates, or rather such addition is kept up to date all the time, in addition to the custom weights. I would take the amount of the total sales and by subtracting from such amount of total sales the amount of the custom-house weights and considering the amounts that were actually on hand I would obtain the overage, and, in this process I would ignore completely and would take no account of such quantities of coal as Mr. Mills may or may not have charged as having actually been loaded into his barges.

With reference to the occasion when we ascertained pipes were laid into a large pile of coal down at the yard. At one time I would say that I think there was about five or six thousand tons of coal in the pile and that it was showing signs of heat. I was afraid of spontaneous combustion. The pipes were laid and the hose was turned on the coal and it was flooded. I am not an expert on coal, but I know there is danger of spontaneous combustion in a large amount of coal. [206—152] I have seen some coal burn up that way.

James Dunsmuir had a half interest in the ownership and operation of the barges of which I have



(Testimony of D. C. Norcross.)

spoken from July, 1904, to 1907. The other half interest was held by the Western Fuel Company, which together with James Dunsmuir formed the Western Transport Company. Half of the barge stock was really held by the Wellington Colliery Company, with whom we were working on a joint account at that time, and the Western Fuel Company held the other half.

The margin between the price the Western Fuel Company paid for and the price which they got for imported Australian coal was very narrow, and sometimes there was a loss. The loss has sometimes run up into such high figures as \$200,000 or \$300,000.

(A certain statement or sheet of the coal stock of the Western Fuel Company, as of date March 31, 1906, having been misplaced, it was agreed by counsel for plaintiff and defendants respectively that the amount of coal on hand on April 1, 1906, was between 25,258 and 25,250 tons.)

The annual statements of the Western Fuel Company are intended for the stockholders of the company as well as for the directors.

BE IT REMEMBERED that thereupon the following testimony was given and that the following proceedings occurred:

Q. Mr. Norcross, did you at any time attempt to make any secret of the existence of this overrun, or the fact that the company did have an overrun?

A. No, sir.

Q. Did you see anything strange or to excite suspicion by reason of it?

(Testimony of D. C. Norcross.)

Mr. ROCHE.—That is objected to, may it please the [207—153] Court, as calling for the conclusion of the witness and as immaterial.

The COURT.—The objection is sustained.

Mr. STANLEY MOORE.—We note an exception.

Redirect Examination by Mr. ROCHE.

Some of the barges which I named the other day were operated by the Western Transport Company after the first of January, 1904. The Western Fuel Company owned and controlled one-half of the stock of the Western Transport Company. The other half stood in the name of James Dunsmuir, but the Wellington Colliery Company was the owner of it. John L. Howard was president of the Western Transport Company as well as of the Western Fuel Company. The barges were used in connection with the Western Fuel Company's business. The Western Transport Company was engaged in transporting coal in the barges, but I don't believe that they transported any coal other than that of the Western Fuel Company. The crews were employed by the Western Transport Company. It is not my understanding, however, that all of the barges that were in use by the Western Fuel Company after January 1, 1904, and prior to December, 1912, were barges owned by the Western Transport Company. The time up to which the barges were so owned by the Western Transport Company was December 31, 1911, or 1912. Some of the barges were owned by the Western Fuel Company on January 1, 1904. I don't recall the names of the particular barges. Sometime

(Testimony of D. C. Norcross.)

during 1904, and after July of that year, the barges which on January 1, 1904, were owned by the Western Fuel Company, were transferred to the Western Transport Company. John L. Howard has been president of the Western Transport Company continuously since July, 1904. The directors, other than [208—154] John L. Howard, were James B. Smith, and Joseph L. Schmitt, but I don't recall the others, but I can say, however, that the directors of the Western Fuel Company constituted a majority of the directors of the Western Transport Company. That is true, from the date of the incorporation up to December 31, 1913. I was secretary of the Western Transport Company. As a matter of fact I think the Western Transport Company went out of business in the latter part of 1911. When the Western Transport Company went out of business its barges were transferred to the Western Fuel Company. It was in September, 1907, that the Western Fuel Company purchased that portion of the stock of the Western Transport Company which prior to that time it had not owned; so that in September, 1907, this outstanding one-half of the stock of the Western Transport Company, which had been controlled by the Wellington Colliery Company, was purchased by the Western Fuel Company. Therefore, while there were two corporations in existence after that date, the Western Transport Company owning the barges, and the barges doing the business of the Western Fuel Company, all of the stock of the Western Transport Company was in

(Testimony of D. C. Norcross.)

fact owned by the Western Fuel Company; and after this transfer of stock all of the directors of the Western Transport Company were either directors or employees of the Western Fuel Company. The books of the Western Transport Company are in my office. During the existence of the Western Transport Company the barges carried coal for the Western Fuel Company at so much per ton. No statements were furnished, however, from time to time by the Western Fuel Company to the Western Transport Company showing the quantity of coal thus carried. The out-turn weight of the barges was used as the basis for determining the compensation to which the Western Transport Company was entitled. The Western Fuel [209—155] got the figures upon which it paid the Western Transport Company from the delivery tags of all coal delivered ex the barges. Those delivery tags came from Mr. Mills. I presume they coincide with the figures kept by Mr. Mills.

(Referring to a contract entered into between the Western Fuel Company and the Wellington Colliery Company, appearing on page 75 of volume 1 of the minutes of the Western Fuel Company, under date of July 23, 1904, the witness says that the copy of that contract as appearing in said minutes is correct. The following extract from said contract is then read in evidence, the remainder of the contract being deemed to have been read, and the whole document is introduced in evidence without objection:)

“Present: Messrs. John L. Howard, James B.



(Testimony of D. C. Norcross.)

Smith, Sidney V. Smith and Joseph L. Schmitt; absent Mr. J. C. Wilson."

Q. The J. C. Wilson mentioned in these minutes is Mr. J. C. Wilson, the broker? A. Yes.

Mr. ROCHE.—(Continuing.) "The President submitted the contract made with the Wellington Colliery Company, whereupon Mr. Sidney V. Smith offered the following resolution, which was seconded by Mr. J. L. Schmitt and adopted:

"Resolved that the execution by the President and Secretary of the contract with the Wellington Colliery Co., Ltd., and dated July 19, 1904, be and the same is hereby ratified and confirmed, and that said contract be spread at length in the Minute Book of this Company.

"The Wellington Colliery Co., Limited, a corporation organized under the laws of British Columbia, hereinafter called the Wellington Company, and the Western [210—156] Fuel Company, a corporation organized under the laws of the State of Cal., hereinafter called the Fuel Company, intend to furnish jointly, and as far as possible, equally, all the British Columbia Coal that can be sold by the Fuel Company, acting for itself, and as agent of the Wellington Company, in California, for prices satisfactory to the Fuel Company, and, irrespective of the amounts of coal contributed by each, to divide equally the profits of the business of the Fuel Company in dealing with coals of all the kinds referred to in this agreement.

"To that end they agree with each other as follows:



(Testimony of D. C. Norcross.)

“First. The Wellington Company hereby constitutes the Fuel Company its agent for the sale in California of the product of the Wellington Company’s mines in British Columbia, via. Wellington Coal shipped from Ladysmith, Comax Steam Coal shipped from Comox, Comox Anthracite Coal shipped from Comox and Comox coke coal shipped from Comox.

“These coals shall be sold under the names of ‘Dunsmuir’s Wellington’ and ‘Comox.’ The Wellington Company expressly reserves to itself the right to sell coal to any person or persons in California for any price it sees fit, but if the Wellington Company shall sell coal to any person in California other than the Fuel Company, or shall sell coal to any person to be imported into California for sale, the Fuel Co. may at its option rescind this contract.

“Second. It is the intention hereof, that as nearly as possible the quantity of British Columbia Bituminous Coal sold in California by the Fuel Company shall come one-half thereof from the Fuel Company’s [211—157] mines near Nanaimo on Vancouver Island, and one-half thereof from the said mines of the Wellington Company.

“The Fuel Company shall have the right from time to time to require from the Wellington Company the delivery to the Fuel Company of an amount of coal equal to that shipped to California by the Fuel Company and the further right, if the — Fuel Company by reason of the condition of its mines, or fires, accidents, strikes, labor troubles or

(Testimony of D. C. Norcross.)

acts of God, shall be unable to furnish one-half of the amount of British Columbia Coal which it can sell in California, at prices satisfactory to the Fuel Company, to require from the Wellington Company all excess of the British Columbia coal up to its own productive capacity which it can so sell in California over the amount shipped to California by the Fuel Company. The Fuel Company shall ship to California one-half of the amount of British Columbia Coal which it can sell in California at prices satisfactory to itself, and if, by reason of the condition of the Wellington Company's mines, or of fires, accidents, strikes, labor troubles, or acts of God, the Wellington Company shall be unable to furnish an amount of coal equal to that shipped to California by the Fuel Company, the Fuel Company shall further ship to California all excess of British Columbia Coal up to its own productive capacity, which it can sell in California, at prices satisfactory to itself, over the amount furnished by the Wellington Company.

“Third. The Wellington Company shall not furnish to exceed ten thousand tons per month of Comox Steam Coal unless the Fuel Company, in view of the market conditions [212—158] in California, shall require more than this amount.

“Fourth. The Fuel Company shall pay to the Wellington Company for all coal delivered to it by the Wellington Company the following prices, f. o. b. vessels at Ladysmith and Comox.”

I don't suppose you want those prices put in, do you?

(Testimony of D. C. Norcross.)

Mr. STANLEY MOORE.—No, it may all be considered as read.

Mr. ROCHE. — (Continuing.) “Eighth. The Fuel Company shall keep separate account books for all business done by it in British Columbia and other coals, which shall be at all times open to the inspection of the Wellington Company, and the Wellington Company shall have the right to have such books experted from time to time by their accountants.

“Eleventh. Monthly statements shall be rendered by the Fuel Company to the Wellington Company showing the amounts of coal imported, the amounts of sales, the amounts of money and coal on hand and the apparent profit.”

“Fourteenth. The Wellington Company shall be entitled to have a representative in the business in San Francisco to watch its interests but in such case he shall be paid by the Wellington Company.”

During the existence of the above contract, monthly statements were prepared by the Western Fuel Company and forwarded to the Wellington Colliery Company by the bookkeeper, Mr. Martin, and myself. It is not a fact that those statements on their face showed overages in coal. I [213—159] did not at any time send to the Wellington Colliery Company a detailed statement of coal, either received by the barges or discharged by the barges; nor did I at any time furnish to the Western Transport Company a detailed statement of coal discharged from the barges. The office of the Western Transport Company and the office of the Western Fuel

(Testimony of D. C. Norcross.)

Company were the same. The books were kept by the same man, and the whole thing was merely a bookkeeping transaction. The bookkeeping for the Western Fuel Company and the Western Transport Company were therefore practically deemed to be one transaction. It is not a fact that the statements furnished by the Western Fuel Company to the Wellington Colliery Company were exactly the same as the statements which have been heretofore produced in evidence. The statements thus produced and introduced in evidence were the coal received statements, whereas the statements that were furnished to the Wellington Colliery Company were the monthly balance sheets and the monthly earning and expense statements, not giving in detail the weight of the coal sold, but merely in dollars and cents. The Wellington Colliery Company never had an expert go over our accounts for the purpose of ascertaining whether those balance sheets were correct. I do not think we ever furnished them statements regarding the quantity of coal laden on the barges and afterwards discharged from the barges for the purpose of enabling them to determine whether or not the balance sheets were correct or for any other purpose.

I recall stating on cross-examination that I regarded the overage merely as general overages, without regarding the particular place or places at which they may have occurred. As secretary of the company I knew long before [214—160] this investigation commenced that part of this overage did take place upon the barges, and I have known that for a



(Testimony of D. C. Norcross.)

number of years. The statements themselves show it. I knew this, therefore, from 1904 to 1912. I also knew during these years that overages existed in the yards of the Western Fuel Company. When I said on cross-examination that I regarded these overages simply as an overage in general, we were talking about inventories and how we arrived at them. I said I did not pay any attention to where the coal was stored, whether it was in a barge, or whether it was in a yard, when I came to make up the overage at the end of the year, or whenever I took it up. In preparing the inventories and in ascertaining the quantity of coal on hand, I took the coal in the bunkers and the coal in the barges, and the coal in the yard as being on hand, and lumped those respective quantities of coal together.

The monthly statements prepared from time to time by Mr. Martin in my office came under my observation. As a general rule I know those statements contained mention of overages.

I was only once present on the Folsom Street dock that I recall to observe the weighing there of imported coal upon the rising beam. I was at the Folsom Street bunkers once during the time the Western Fuel Company had possession of those bunkers.

When I testified yesterday that it was the custom of the Government to weigh coal imported into this country on a rising beam, I was not referring to the practice indulged in at the Folsom Street Dock.

Q. You also testified yesterday afternoon, in response to questions put to you by Mr. Moore, that in



(Testimony of D. C. Norcross.)

weighing the coal out, that is, the coal that was delivered into the possession of the company, you endeavored to weigh that coal accurately; in other words, it was weighed upon what is known as an even scale, instead of upon a rising or a falling scale or beam; you recall that testimony, do you not? [215—161] A. Yes.

Q. That is, the company's endeavor, as far as possible, was to accurately weigh the coal which it already had received into its possession and which it was then selling? A. Yes.

Q. In other words, being given the advantage of the rising beam when it was importing coal into this port, the company does not undertake to give that same advantage to its customers upon the sale of coal; is that correct?

Mr. STANLEY MOORE.—That is not a fair question. The method of weighing coal which has been followed by the Western Fuel Company is exactly and absolutely in accordance with the printed regulation of the Government, intending to give the advantage to the importer. That is a very improper question.

Mr. ROCHE.—I will withdraw the question.

Mr. STANLEY MOORE.—Well, the question never should have been asked.

Mr. ROCHE.—Do I understand you to say that you have a printed regulation advising the custom weighers to give the advantage to the importer? Have you in your possession such a printed regulation?

Mr. STANLEY MOORE.—I don't say that we

(Testimony of D. C. Norcross.)

have it. I understand, however, it is a printed regulation of the United States Government.

Mr. McCUTCHEN.—And you don't deny that, do you, Mr. Roche?

Mr. ROCHE.—Well, I would like to see it. I must confess that while that has been the practice, I have been unable to find any such printed regulation.  
[216—162]

Mr. McCUTCHEN.—Well, here it is, Mr. Roche, if you want to see it now.

Mr. ROCHE.—Yes, I would like to see it.

Q. Now, let me ask you this question, Mr. Norcross; I understood you to testify yesterday afternoon that the majority of the sales of coal made by the Western Fuel Company were sales made over its wagon scales.

A. Yes, in from one to five ton quantities.

Q. In from one to five ton quantities?      A. Yes.

Q. And those are the quantities which you say the weight of was more or less accurately ascertained?

A. They were accurately ascertained.

Mr. McCUTCHEN.—Mr. Roche, this is a correct copy of the printed regulations issued by the United States Treasury Department, and it says expressly that merchandise shall be weighed on a rising beam. Will you read that to the jury now (handing)?

Mr. ROCHE.—If you say that that is a copy of the custom-house regulations, we have no objection to that being read to the jury. I am willing to admit, as I have heretofore admitted, that it was the practice of the Government weighers to weigh the coal in on a rising beam.

(Testimony of D. C. Norcross.)

Mr. McCUTCHEN.—We understood you to say a few moments ago that there was no such regulation.

The COURT.—No, he said he had not seen a printed regulation. Mr. Roche stated that his understanding was that that was the practice of the Government, but that he had been unable to find any printed regulation.

Mr. McCUTCHEN.—I am not questioning Mr. Roche's statement for a moment, your Honor, and I do not intend to be [217—163] so understood. I would like to have Mr. Roche understand now that there is a book, quite a large book, issued by the Treasury Department, containing instructions to weighers, with reference to the manner in which merchandise of this character shall be weighed. This paper which I have just handed to him is a copy of a clause contained in that printed book. We give him our assurance that this is a correct copy. I now ask him whether he will now read that to the jury, so that they may know what that regulation is, as this testimony goes along.

Mr. ROCHE.—We will admit—I must confess that I don't know what this discussion is over—because we have always admitted that whether there was or was not a printed regulation, that always has been the custom of the custom weighers. If Mr. McCutchen says that that is a copy of the regulation, we will concede it.

Mr. KNIGHT.—And, Mr. Roche, that is in the hands of every custom-house broker, and it does say that merchandise shall be weighed on a rising beam.

(Testimony of D. C. Norcross.)

Mr. STANLEY MOORE.—The discussion arose, Mr. Roche, over the question you asked me whether we had, in our possession, any printed regulation.

Mr. ROCHE.—Yes, because I had never seen such regulation.

I have very seldom been on the barges so as to observe the discharge of coal from them. In testifying concerning the method of discharge I was speaking only partly from personal observation. I saw the operations only once or twice, as I have said. The rest of my testimony is based on hearsay. Even though the coal from the barges is weighed [218—164] by averaging the tubs, if the weights are taken fairly, honestly and accurately, the tubs which are weighed will give approximately the weight of the tubs which are not taken. So that even though the weight of the coal discharged from barges is an average weight that average weight will, if all the tubs are similarly or approximately filled, represent almost the actual weight.

The bills sent out for the Western Fuel Company are prepared by the accountant and the bookkeepers under the supervision of Mr. Martin. Now and then I come in contact with those bills myself. The letterpress book to which you direct my attention contains copies of bills or accounts sent by the Western Fuel Company. In December, 1910, the Western Fuel Company was doing business with the Cumberland Coal Company; that is, they were storing coal for that company from time to time, and charging so much a month for the storage. The Cumberland Coal Com-

(Testimony of D. C. Norcross.)

pany would have a right to obtain delivery of this stored coal at any time they saw fit, and accounts would be kept by the Western Fuel Company showing the amounts left on hand from month to month. Bills would be sent out for this storage. We were not selling coal to the Cumberland Coal Company. The Cumberland Coal Company obtained this coal as a rule from Baltimore by ship.

(A statement from the above-mentioned letter-press book is here offered in evidence, there being no objection, and read, as follows:)

“No. 40. Month, December, 1910.

“Cumberland Coal Company,  
to

Western Fuel Company, Dr.  
430 California Street,  
San Francisco.

“For

Storage on Stock overrun at San Francisco as follows:

On Hand December 1st, 1910, Nothing

Delivered in December 86 1750 Tons

Storage on Same from May

14 to January 1st, 1911.

7 Months 18 days, a .05 \$32.90

Storage figured from date of

discharge of Ship ‘Acme’ the last Vessel unloaded at San Francisco.” [219—165]

The coal mentioned in that bill was delivered in December, but it does not say to whom it was delivered. I do not know where it was delivered.



(Testimony of D. C. Norcross.)

I could not say what particular yard of the Western Fuel Company it was deposited in. The storage record would show that. All of the stock of the Cumberland Coal Company is now owned by the Western Fuel Company, but it was not all so owned in December, 1910, when the above entry was made. Part of it was then owned by the Western Fuel Company—60 per cent—the Western Fuel Company thus owning the controlling interest. The president of the Cumberland Coal Company was James B. Smith. The Western Fuel Company in December, 1910, had a majority upon the board of directors of the Cumberland Coal Company. The Cumberland Coal Company did not import coal; it simply dealt in black-smithing coal.

It is a long time since I have been on the Mission Street bunkers. The coal on the Mission Street wharf is discharged from the bunkers. At Folsom Street a ship discharging imported coal is located on the south side of the dock. The offshore bunker there I know to be located toward the easterly end of the dock, and the inshore bunker toward the westerly end. A ship is ordinarily discharging toward the inshore bunker. If we had a vessel at the other end, the barge could not go in so as to draw up to the offshore bunker. The hoppers are located over the inshore bunker, so that if any coal should by any possibility or through any inadvertence fall and locate itself in the cars as the coal was being dumped from the hoppers into the cars, or fall over the sides of the cars, it would not fall into the offshore bunker

(Testimony of D. C. Norcross.)

because there were boards there to keep it from falling anywhere except on the floor. The coal could not fall into the offshore bunker at the time of discharge because the offshore bunker is at the other end of the bunker. Coal which finally finds its way into the [220—166] offshore bunker has already been on the scales and has been weighed.

The  $9\frac{1}{4}$  per cent which I gave as representing the dividends of the Western Fuel Company was a general average from January, 1904, to date. In 1912 I think the dividend was ten per cent. There was no single dividend of ten dollars declared in 1912. Two dividends of five dollars were declared on February 4, 1913. I regarded the barges as storage places, but, of course, they are used for transporting imported coal to vessels. That is the only method by which coal can be supplied to those vessels. Our weighers kept records of Folsom Street aside from the records kept by the custom-house weigher of the weight of imported coal discharged from incoming vessels, either into the bunkers or the yards of the Western Fuel Company. The yellow sheets of paper signed by the weigher and sent to the office from time to time show the distribution of coal discharged from a boat, that is, the quantity of coal from a particular ship that went in the offshore bunkers, or in the inshore bunkers, or in the yard, and what quantity of coal was discharged by means of the bunkers directly into a barge. Those sheets would be sent into our office immediately after a ship was discharged.

(Testimony of D. C. Norcross.)

Recross-examination by Mr. MOORE.

Mr. MOORE.—Q. Now, Mr. Norcross, you have stated that the times at which you had reference to in making the answer that the overrun was regarded by you as one general overrun, would be the times that you would be taking an inventory, have you not?

A. Yes.

Q. Now, you have testified that in taking the inventory you ascertained by actual examination, either you, yourself, or by some one acting under you, I presume, the quantities of coal on [221—167] hand in the yard, and in the bunkers and in the barges; in other words, all of the coal of the company that was on hand at the time the inventory should be taken; is that not correct?

A. That is correct.

Q. And then you have figured the quantities of coal, as recorded by the rising beam of the custom-house weights for the period in question, as to which your inventory or overage will relate, have you not?

A. I have.

Q. And the quantities of coal as shown by your sales, from every source, barge, yard and everything; is that correct? A. That is correct.

Q. Now, then, I want to ask you whether or not that is the most accurate way known to you, if not the only way in which to accurately compute the overage?

A. It is the only accurate way we have, as we only keep the one account, the coal account.

Q. The only accurate way for you to compute the

(Testimony of D. C. Norcross.)

overage, which you say you regard as the general overage, as computed at this time is at the time you take an inventory of the stock on hand? A. Yes.

Q. Now, that inventory of the stock on hand, as you have testified to, includes the coal that happens to be at that particular time upon the barges, as well?

A. Yes,

Q. Now, I want to ask you this further fact, with reference to coal on barges and the different uses that are made of the barges in the business of the company. Is it or is it not the fact that when the bunkers are filled and the yards are filled, coal is also laden upon the barges to be stored there as well?

A. Yes, sir.

Q. So that, at times, the barges, or some of them, are used for [222—168] storage purposes, alone; is that not true? A. Yes, that is a fact.

Q. And at other times, all of them will be filled up according to the current orders, so far as discharging into vessels is concerned, when but a small amount of coal might be required to be loaded into them; is that correct? A. That is correct.

Q. You were asked, Mr. Norcross, with respect to the system that was used in the weighing out of coal from the barges into the vessels, and I am now referring particularly to vessels carrying the American flag, upon which the drawback is payable, and I want to ask you with respect to that system, who is that system conducted by, and who is it provided for by, and who is it directed by, if you know?

A. The custom authorities.



(Testimony of D. C. Norcross.)

Q. By the United States Government, is it not?

A. Yes, the United States customs authorities.

Q. I want to ask you this further question in connection with that system, do you know by whom the weighing of the coal done upon such occasions is actually done?

A. By the United States customs weighers.

Q. By the United States customs weighers?

A. Yes.

Q. Now, you stated here yesterday that the system or practice, whichever the word was that was used, was what is known as the system of average, or the practice of average, did you not?      A. Yes.

Q. What do you mean by that term in referring to it as a practice, or average, or system of average?

A. The weighing of one tub out of every so many and averaging the balance by the weight of the one.

Q. In point of fact, do you know what the custom is with respect to the average, as to how many tubs it shall be out of [223—169] how many that passes over the side of the ship?      A. Four out of sixty.

Q. Four out of sixty, or that would be the equivalent of one out of fifteen?      A. Yes.

Q. Do you know what the rules and regulations of the United States Government prescribe in that regard, as to how many it shall be, whether one out of fifteen or one out of fifty?

Mr. ROCHE.—One moment, may it please the Court. That question is objected to on the ground that it calls for hearsay and is not the best evidence. I don't think there will be any question about that.



(Testimony of D. C. Norcross.)

Mr. McCUTCHEN.—We have the regulations.

Mr. MOORE.—We are willing to agree as to what the regulations prescribe. Suppose we read them in evidence right now; this is an opportune time.

Mr. MOORE.—The provision in question, if your Honor please, is known as Article 1487, and is offered in evidence at this time, if it is necessary to make a formal offer.

Mr. ROCHE.—I wish to state, may it please the Court, that there isn't any necessity of offering any of these regulations in evidence, because the Court will take judicial notice of the regulations emanating from one of the State Departments of the Government.

Mr. MOORE.—Of course, the Court will take judicial notice of it and the attorneys are supposed to have judicial notice of it, but we are confronted by the surprising circumstance in this case that Mr. Roche never knew about these regulations until this morning, nor about the rising beam, nor did Mr. Tidwell, either.

Mr. ROCHE.—Counsel ought not to make a statement of [224—170] that kind, because we have consistently and persistently admitted that was the practice. I did say that I never saw it in print.

\* \* \* \* \*

Mr. MOORE.—Article 1487 is as follows:

“Article 1487. Coal and salt. Coal and salt will be landed under the supervision of discharging inspectors. If the inspector cannot personally take account of the coal”—this relates, gentlemen, to the

(Testimony of D. C. Norcross.)

number of buckets that shall be weighed upon the average system, the particular portion that I am reading now—"If the inspector cannot personally take account of the coal or salt delivered, the weigher is required to designate a competent man to keep the tally, under the supervision of the inspector. At least one tub in every fifty must be accurately weighed, and when weighed care must be taken to have it filled as nearly even as possible. The inspector will see that uniformity is preserved in delivering the coal or salt. Importations of coal, railroad iron, scrap iron, and other bulky merchandise may be weighed upon either platform or railroad scales, upon application of the importer, when the expense of the weighing shall not be increased. In such cases, the weighing shall be done on scales carefully tested, at each weighing, with the United States standard weights."

The other one, relating to the rising beam, provides as follows:

"Article 1482. Before weighing any merchandise the weigher must see that the beam is accurately balanced. [225—171] As correctness of weights depends very much upon the accuracy of the poise, the beam should always be kept clean and be frequently tested with the standard. A fairly even beam indicates the weight, but as, in weighing merchandise, it seldom happens that the beam will stand at an exact poise, but will go either above or below an even beam, the weight will be taken on the rising beam. Weighers are required to mark the weight on each single package weighed."

(Testimony of D. C. Norcross.)

At or about July, 1904, the Western Transport Company owned the barges of which I have heretofore spoken. It also employed the people working on said barges. From or about July, 1904, until September, 1907, a half interest in those barges and in the Transport Company was owned by the Wellington Colliery Company, through James Dunsmuir as the owner. In September, 1907, the Western Fuel Company acquired that half interest of the Wellington Colliery Company in the Western Transport Company. From 1904 until 1907, the barges were operated to the joint account of these owning companies, the Western Fuel Company and the Wellington Colliery Company.

Referring to the bill which was shown me on re-direct examination, apparently sent out in December, 1910, by the Western Fuel Company to the Cumberland Coal Company, I would say that the charge made therein for 60 or 80 tons of coal was for storage over a period running from the end of December, 1910, back until May or June, 1910, when the vessel which brought this Cumberland coal, namely, the "Acme," was unloaded.

Q. How is it that upon the 1st of December, 1910, as Mr. Roche [226—172] has stated, there does not appear to have been any coal on hand, but nevertheless during the month of December, 1910, there appears to have been delivered out 87 tons of coal belonging to the Cumberland Coal Company?

A. Well, the Western Fuel Company charged itself up with taking so much Cumberland Coal in

(Testimony of D. C. Norcross.)

whenever that ship was discharged, in May or June, 1910. They made bills for storage and account for deliveries each month, showing the balance on hand at the end of the month on which they collected a 5-cents a ton storage, and they made their November bill that they had sold all of the coal they had stored, whatever the quantity was, and maybe a little bit more, so in December they found they had delivered this quantity of 84 tons of coal; they made their bills showing that they had not on hand on the 1st of December, according to the quantity taken in, as they had delivered, as much as they had taken in, so they billed them for the back storage on that amount of coal, presuming they had it all the time.

Q. Would this be stating the case for purposes of illustration: Assuming that on the 1st of May this steamer "Acme" discharged according to the weights 3,000 tons of coal belonging to this Cumberland Coal Company, which was actually by the Western Fuel Company and delivered out or sold by that company and that by the 1st of December, 1910, they had weighed out on the out-turn weights 3,000 tons of coal, then according to the book account it would be balanced, would it not?

A. Yes.

Q. But if there still remained there 87 tons of coal it would be what might be termed an overage, would it not? A. That is correct. [227—173]

Q. That would manifest itself or show up, to use a slang expression, on December 1, 1910, when the equivalent poundage had been weighed out as that



(Testimony of D. C. Norcross.)

which had been received according to the weights which were taken at the time of the unloading of the ship.     A. Yes.

Q. And then that charge for 80 odd tons, why was that made to relate back to the date in May or June at which the vessel had discharged?

A. Because we had only been charging storage on the original quantity weighed in, and if we had actually—it actually on hand at the final cleanup, it was presumed we had it on hand at the start, I guess.

Q. Do you know whether or not that particular coal is dutiable coal?     A. It was not.

Q. That was not dutiable coal at all or coal upon which any duties whatsoever were paid, was it?

A. No.

Q. What do you call that coal?

A. Smithing coal, Cumberland coal.

Q. Whereabouts does it come from?

A. From Baltimore, I believe.

Q. It comes from Baltimore.

A. Or from Newport News.

Q. Then in the case of this domestic coal that had been shipped in here by the steamer "Acme" and discharged in May, we will say, 1910, the overage demonstrated itself or showed up in the books on December 1, 1910, did it not?

A. Whenever it was finally cleaned up during December.

Q. Either in December or January?     A. Yes.

Q. Thereupon a charge was made by the Western



(Testimony of D. C. Norcross.)

Fuel Company of the amount of that overage which related back to the period and the commencement of the period during which it had been actually [228—174] stored? A. Yes.

Q. Now then, Mr. Norcross, isn't the reason that you have just mentioned the reason why this bill states and charges on the face of it for storage on stock overrun?

A. That is what it is, overrun stock.

At the time that we have been referring to 40 per cent of the stock of the Cumberland Coal Company was owned by the Pacific Coast Coal Company; 60 per cent being owned, as I have heretofore stated on redirect examination, by the Western Fuel Company. The Pacific Coast Coal Company was an entirely outside and separate company from the Western Fuel Company.

Further Redirect Examination by Mr. ROCHE.

The blacksmithing coal of the Cumberland Coal Company was being sold at \$12 and \$14 a ton; and, of course, the Western Fuel Company owning 60 per cent of the Cumberland Coal Company, would receive from time to time 60 per cent of the dividends declared by that company upon its stock. I don't recall the dock at which this Cumberland coal was discharged which came in on the "Acme." This coal that goes to blacksmithing purposes was ordinarily sold to the local trade in San Francisco, and not laden on any ship or barge, but some of it might be shipped by steamer freight. This coal, I presume, was stored either in our yards or bunkers.

(Testimony of D. C. Norcross.)

I have no recollection as to what particular yard it was stored in. When the coal would be taken from our yards to be supplied to the local dealers, it would be weighed from the scales of the Western Fuel Company and by its weighers. The books of the Cumberland Coal [229—175] Company were not in December, 1910, in the possession of the Western Fuel Company. The Cumberland Coal Company had its own office in the Postal Telegraph Building. The daily records concerning the weighing out of this coal were kept in the office of the Western Fuel Company or in the place where the coal was actually weighed. If there were any overages resulting from this coal thus being stored with the Western Fuel Company, the profits resulting from that overage would be distributed 60 per cent to the Western Fuel Company and the remaining 40 per cent to the Pacific Coast Coal Company. The secretary of the Cumberland Coal Company at that time was D. G. Stark. I am now secretary, and have been since September or October, 1911. No duty was payable on this coal to the Government. I do not say that this Cumberland coal was necessarily discharged on some dock in the possession of the Western Fuel Company. I could not tell you whether this particular coal was weighed when it was delivered into our possession. It was customary however to weigh this Cumberland coal when it came into the possession of the Western Fuel Company. It was customary to weigh the coal when it was being discharged. I do not know what the method of weighing is.

(Testimony of D. C. Norcross.)

Mr. ROCHE.—Q. Now, directing your attention again to this item upon which you have been to some extent cross-examined, it is a fact, is it not, that when this coal was finally weighed out of your yard or out of your bunkers or whatever other place this coal was stored, that you sold, or that there was sold rather, whether it was sold by the Western Fuel Company or the Cumberland Coal Company itself, 86 tons, 1770 lbs. more than the actual weight at the time it was placed in storage; is that correct?

A. That is correct. [230—176]

Q. Is it correct, Mr. Norcross, when I say that the books of the Cumberland Coal Company will show the exact out-turn weight of the “Acme” concerning the coal which was stored by the Western Fuel Company out of which this transaction arose?

A. Yes.

Q. And who has possession of those books at the present time? A. I have.

Q. Now, in the final analysis, Mr. Norcross, so far as this particular transaction is concerned, the Cumberland Coal Company having sold a little more than 86 tons of this coal, worth between twelve and \$14 a ton more than it received, according to the weights, it of course made between—it received between \$1032 and \$1300 for that excess or overage coal, did it not?

A. Providing my prices are right, and I think they are.

Q. But depending upon those prices? A. Yes.

Q. Of course, out of that money or out of that

(Testimony of D. C. Norcross.)

profit the Western Fuel Company received 60 per cent and the Pacific Coast Coal Company 40 per cent?

A. They owned those portions of the corporation.

Q. By the way, let me ask you this final question upon that subject, Mr. Norcross; did the Cumberland Coal Company own the mine or mines from which this coal was derived? A. No, sir.

Q. It bought the coal, did it? A. Yes.

Q. Did it buy the coal upon the out-turn weight?

A. I don't know whether it did in that case, or not; I doubt it.

Q. You have no recollection—

A. (Intg.) On the out-turn weight, yes, I think probably they did. [231—177]

Q. Of course, this 86 tons, 1750 lbs. represented that many tons and lbs. in excess of the out-turn weight or in other words, in excess of the coal upon which the purchase price was paid; isn't that true?

A. It represents the out-turn weight, the excess on that portion that was stored with the Western Fuel Company. I don't know whether it was 2,000 tons or whether 4,000 tons or 5,000 tons, that the vessel carried.

Q. In any event, Mr. Norcross, it is true, that if the purchase price was paid upon the out-turn weight, where the whole of the cargo was stored with the Western Fuel Company, or only a part of this cargo was stored with the Western Fuel Company, so far as this 86 tons of overage was concerned, which was the overage of the coal deposited



(Testimony of D. C. Norcross.)

with the Western Fuel Company, the Cumberland Coal Company, did not pay for that coal?

A. No, they did not.

Q. In other words it represents clear profit, don't it? A. Yes.

It is my understanding that on the barges it has been the custom here to weigh one tub in 15 or 4 out of 60. The Pacific Coast Coal Company is still in existence. None of the members of the board of directors of the Western Fuel Company are on the directorate of the Pacific Coast Coal Company.

Mr. ROCHE.—Q. Let me ask you one other question, Mr. Norcross, about this overage, this Cumberland Coal Company overage. The bill which you have presented here dated back, did it not, to the date of the receipt of the entire cargo or part of the cargo of coal by the Western Fuel Company?

A. Yes. [232—178]

Q. In other words, the Western Fuel Company charged the Cumberland Coal Company storage upon this excess coal as though that excess coal had been on deposit in the yard or bunkers of the Western Fuel Company since the date upon which the "Acme" was discharged; isn't that correct?

A. It appears that way.

Q. What appears that way? A. The bill.

Q. The bill appears that way? A. Yes.

Q. In other words, the charge of the Western Fuel Company for storage was upon the out-turn weight of the coal actually stored with the Western Fuel



(Testimony of D. C. Norcross.)

Company plus 80 tons of overage; isn't that true?

\* \* \* \* \*

A. It was on the total amount delivered.

Q. That is not an answer to my question, Mr. Norcross. Let me put the case in another form by way of illustration: If 1,000 tons of coal had been taken out of the ship "Acme" upon we will say the 1st of July, 1910, according to the out-turn weights; and between the 1st of July, 1910, and the 31st day of December, 1910, there had been sold out of that coal 1100 tons, in other words, an overage of 100 tons, the Western Fuel Company in sending a bill for storage to the Cumberland Coal Company would charge it for 1100 tons as having been stored upon the day upon which the "Acme" coal was discharged from the ship in place of 1,000 tons; isn't that correct?

A. If they followed the directions of that bill, they would, yes.

Q. That was the practice, of course, pursued by the Western Fuel Company?

A. I don't know whether it was or not. But it was done in that instance, anyone can see that.

[233—179]

Q. In other words, Mr. Norcross, if this bill is correct, then there was stored with the Western Fuel Company on the day or dates upon which this vessel the "Acme" was discharged 86 tons of coal in excess of the out-turn weight and in excess of the weight upon which the Cumberland Coal Company paid to the mines for its coal; isn't that true?

(Testimony of D. C. Norcross.)

A. That is possible.

Q. You say it is possible; isn't that true?

A. I don't know that it is true. What if it got rained on, got water in it? Wouldn't the coal have been heavier than originally, if it had taken on moisture? It is the finest kind of coal that comes into the market; it is made up of fine coal, and it will hold water more than any other coal will.

Q. You say that it will hold water? A. I do.

Further Recross-examination by Mr. STANLEY MOORE.

Even with respect to domestic coal, in connection with which no duty is to be paid at all, the Western Fuel Company insists upon having a representative of the ship present when the coal is being weighed out. This representative is called a weigher or checker. When foreign or imported coal is discharged, there is, as a general rule, present a government official—who actually performs the weighing,—a checking clerk representing the Western Fuel Company, and the clerk representing the ship.

**[Testimony of G. L. Hahn, for the Government.]**

G. L. HAHN, a witness called for the United States and sworn, testified as follows:

[Endorsed:] Filed Jan. 19, 1915. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [234—180]

Direct Examination by Mr. ROCHE.

I live in San Francisco. I am now employed by the Western Fuel Company, and have been off and

(Testimony of G. L. Hahn.)

on for a number of years. I am now employed at the Green Street bunkers. I have been employed for a number of years on and off upon the Folsom street bunkers as a weigher or assistant weigher, checking the weights of the custom-house officer. I make a record of the weights I get in a book. The customs-house officer calls out the weights and I see that the beam is correct and I put them down in this book. I am familiar with the Folsom street bunkers, and know what are the offshore and inshore bunkers respectively. There are about 22 or 23 pockets or compartments in the offshore bunker. The pockets are divided by partition walls that extend from the floor of the bunker to the top. When the imported coal is being discharged from an incoming vessel, the hoppers are spotted over the inshore bunker.

(Admitted by counsel for the defendants that the ordinary practice or custom pursued there is to spot or locate the hoppers opposite each hatchway in the vessel, but over the inshore bunker.)

After a load of coal is weighed it is sometimes sent to the offshore bunker. They always try to keep a record of what particular compartment or pocket in the offshore bunker the coal they have weighed is discharged into. I keep that record in my book. Only coal that is weighed goes into the offshore bunker,—that is, so far as I am concerned. Whenever coal is to be deposited in any of the pockets of the offshore bunker, it is first weighed and then dumped into the particular pockets or compart-

(Testimony of G. L. Hahn.)

ments. The weight of the coal which goes into the particular compartment or pocket of the offshore bunker is recorded in this book by me. If coal was on the ship first, it would be weighed before being placed in the compartments or pockets of the offshore bunker. Sometimes coal that goes into the offshore bunker comes from the yard and sometimes from the ship. When it comes from the ship it invariably goes over the scales first and is weighed. A record is [235—181] kept by me of the weight of this coal. This record shows the particular compartments or pockets into which the coal thus weighed was dumped. The coal which comes from the yard is also weighed before being dumped in the offshore bunker; so that, as far as I know, all coal, whether coming from a vessel or from the yard, is first weighed before going into the pockets or compartments of the offshore bunker, and the weights are recorded in a book with reference to the pockets. Mr. Mayer is one of the weighers on the Folsom street dock. I guess he does most of the weighing for the Western Fuel Company.

(Admitted here by counsel for defendants that the signature attached to a certain document now shown to the witness is the signature of Mr. Mayer.)

This document now shown me is not the daily record which I kept when I was on the Folsom street dock. I made my record in a book. The signature to this document is not my signature. The weights that I got were first recorded in a tally-book. From

(Testimony of G. L. Hahn.)

that tally-book some person (at the end of the day) compiles the records, a sample of which is now shown me. I turn my accounts over to Mr. Mayer at the conclusion of the day's work, and these daily report sheets—one of which is now shown me—are compiled by him from those records.

(Admitted by counsel for the defendants that the sheet now in Mr. Roche's hands is one of a series of sheets similar in kind that are filled out each day at the Folsom street dock, and that the sheets contain a summarization of the discharge of the entire cargo upon the boat; this admission is subject to correction.)

Mr. ROCHE.—I just want to call the jury's attention to this, may it please the Court, at this time. I [236—182] will say, gentlemen, that we have already introduced in evidence the invoices and likewise the bill of lading and the consumption on discharge of this particular cargo, which shows that upon the out-turn weight the cargo was 108 tons, 1780 lbs. short.

Mr. OLNEY.—Which cargo is that?

Mr. ROCHE.—This covers the discharge of New Wellington coal from the "Titania" at Mission street wharf in April, 1911. This is the Mission street wharf record. The records I presume are the same.

Mr. STANLEY MOORE.—This is not the Folsom street record?

Mr. ROCHE.—No.

Mr. MOORE.—She was 108 tons short on what cargo?



(Testimony of G. L. Hahn.)

Mr. ROCHE.—On a cargo of New Wellington coal.

Mr. STANLEY MOORE.—Of how much?

A. Of 5,555 tons.

Q. This is the Western Fuel Company Daily Report, N Wellington Coal, discharged ex—"Titania," April 20, 1911. Hoist No. 1— Let me ask you whether you will also make this admission: these reports show, do they not, the weight of coal discharged from each hoist?

Mr. STANLEY MOORE.—I presume they purport to show that.

Mr. ROCHE.—They show the recorded weights there.

Q. Let me ask you, Mr. Hahn, this question, while counsel is examining that report.

Mr. STANLEY MOORE.—That purports to show that.

Mr. ROCHE.—Is there a record of the discharge of coal from each hoist? A. Yes. [237—183]

Q. That is one of the hoppers which is located upon the tracks or upon the rails there?

A. They have four hoists there and they keep a record of each one; that is, I have always done it.

Q. That is, there is one hoist opposite each hopper; is that correct? A. Certainly.

Q. And of course opposite each hatchway in the vessel from which coal is being discharged?

A. Yes.

Q. And there is a record kept of the actual discharge from each hopper? A. Yes.

Q. Representing of course the coal taken out of

(Testimony of G. L. Hahn.)

each hatchway of the vessel?      A. Certainly.

Mr. STANLEY MOORE.—We will admit that these blanks were customarily kept and filled in as is indicated by these printed pages.

Mr. ROCHE.—I am willing to take an admission subject to any correction that you may desire to make, so that counsel will not be bound by the admission.

“New Wellington Coal. Discharged ex-Titania, April 20, 1911. Hoist No. 1.” This evidently was average coal. “211 tons 1600 lbs. Hoist No. 2, 268 tons, 1340 lbs. Hoist No. 3, 236 tons, 1370 lbs. No. 4 Hoist, 235 tons; 1030 lbs. Total 952 tons, 760 lbs.” Now, on the other side is the destination of this coal: “To Wharf Bunker 186 tons, 1450 lbs.”

(The witness here explains that the wharf bunker last referred to is the inshore bunker.)

Mr. ROCHE.—“To Wharf Bunker 16 tons, 1450 lbs. To Yard, nothing. Barge “Thebold” 725 tons, 1300 lbs.”

It sometimes happens that while a boat is discharging into these hoppers opposite the ship and located over the inshore bunker, there is a barge loading at the offshore bunker. The coal discharged into the barges is taken from the pockets or compartments of the offshore bunker. It is done in this way. Take for instance pocket 17, there may be 50 tons in that pocket, and we are going to feed the barge from that pocket. We empty the 50 tons out on to the barge. We have a record of how many tons there are in the pocket, also the pounds. [238—184] If you wish to get 100 tons of coal upon a particular barge, and

(Testimony of G. L. Hahn.)

there are only 50 tons in a particular pocket, you empty out that coal first, and then bring more coal into the pocket, and from the pocket on to the barge.

Mr. ROCHE.—Continuing reading this Report: “Barge ‘Thebold’ 725 tons, 1300 lbs. Offshore bunkers 40 tons, 250 lbs. Total, 952 tons, 760 lbs.” These figures equal in the total the exact amount of coal discharged as shown by the daily report. Now, at the bottom of that in the left-hand corner is this statement: “Invoice 5575.” That of course you will concede indicates tons?

Mr. McCUTCHEN.—Yes.

Mr. ROCHE.—“Discharged 952 tons, 760 lbs. Balance 4622 tons, 1480 lbs.”

Now, you will concede also, will you not, that from the invoice weight upon this daily report is deducted the quantity discharged and the balance refers to the balance supposed to be in the vessel according to the invoice weights.

Mr. STANLEY MOORE.—That is what it purports to state. I do not think there is any occasion to take up very much time on that. The whole matter can be considered read in evidence, so far as we are concerned.

Mr. ROCHE.—You will also concede without the necessity of my reading this to the jury, that the same daily report is made each day until the boat is discharged, and in the left-hand corner each daily report commences with the balance supposed to be in the boat according to the invoice weight.

Mr. STANLEY MOORE.—That is what the re-

(Testimony of G. L. Hahn.)

port ought to contain, and I presume they do. [239—185]

Mr. ROCHE.—Now, I want to read to the jury a summary of the coal discharged from the boat itself to which all of these tags are attached: “Western Fuel Company. Summary of New Wellington Coal discharged ex ‘Titania,’ Mission street wharf, April, 1911. Date, 1911. April.” Without reading this in detail I will just state what it purports to show. It discloses the various dates upon which the boat was discharged; it shows the number of tons and the lbs. discharged from each hoist, No. 1, Hoist No. 2, Hoist No. 3 and Hoist No. 4. It also indicates the total number of tons and lbs. of coal discharged from the vessel each day, being the aggregate number of tons discharged from each hoist. Then at the end it shows the destination of the coal. It was in that we were particularly interested, and I will just read that part. I might state to counsel we are doing this for the purpose of demonstrating, if I may use that expression, that the Western Fuel Company did know each lb. of coal that went into this offshore bunker.

Mr. STANLEY MOORE.—We are ready to give you an admission that will facilitate getting it into the evidence, but do not not stop and try to argue it.

Mr. ROCHE.—This was the ultimate destination of this cargo of coal: “725 tons, 1300 lbs. went into the barge ‘Theobold.’ 40 tons 250 lbs went into the offshore bunker.” That was on April 20th. On April 21st, 52 tons, 480 lbs. went into the barge “The-

(Testimony of G. L. Hahn.)

bold." 528 tons, 390 lbs. went into the barge "Nainimo." On April 22, 241 tons, 1180 lbs. went into the same barge, and on the same date 695 tons, 1200 lbs. went into the barge "Comanche." On April 24th, 115 tons, 1420 lbs. went into the barge "Comanche," and 25 tons, 1650 lbs. into [240—186] the offshore bunkers. On April 25th, the final date of discharge, 251 tons, 1260 lbs. went into the offshore bunkers, making a total of 2678 tons, 170 lbs. that went into the barges or compartments of the offshore bunkers.

Will you mark that as an exhibit, Mr. Clerk?

(The paper was marked "U. S. Exhibit No. 124.")

**[Testimony of W. H. Tidwell, for the Government.]**

W. H. TIDWELL, called for the United States and sworn, testified as follows:

I live in San Francisco. I am connected with the Treasury Department of the United States as Special Agent, in charge of the 17th Special Agency District. I have been connected with the Department as Special Agent for about 4½ years, and with this particular district during that entire period. My investigations in connection with the subject matter of this indictment began in August or September, 1912. I have in the course of my investigation made an examination of some of the books, records, papers and vouchers of the Western Fuel Company. I began such last-mentioned examination about the middle of February, 1913. I do not claim to be a certified accountant, but I have had some experience in accounting for the last twenty years. I have examined numerous



(Testimony of W. H. Tidwell.)

accounts of various firms in connection with values and in connection with frauds alleged to have been perpetrated on the Government, and which were under investigation by the Government. I have also been appraising officer, and have investigated many firms in connection with their importations. I have made a computation with reference to the quantity of foreign coal imported into this port by the Western Fuel Company between the 1st of [241—187] April, 1906, and the 31st of December, 1912. I have made an examination of the books and records of the Western Fuel Company for the purpose of ascertaining the difference between the invoice and bill of lading weight on the one hand and the out-turn weight on the other hand of foreign coal imported by the Western Fuel Company into the State of California, from April 1st, 1904, to December 31, 1912; and in connection with that examination I had access to the records of the custom-house. I made a comparison between the invoice and bill of lading weight and the out-turn weight of each one of those cargoes coming into this port between those dates. I also made an examination of the custom-house records relative to drawbacks claimed by various steamship companies upon boats which the Western Fuel Company supplied with coal.

Q. Will you at this time, Mr. Tidwell—and it will avoid examination hereafter—explain to the jury what you mean by a draw-back claim?

A. The drawback paid during the time of this investigation was under two tariff acts, the Tariff Act

(Testimony of W. H. Tidwell.)

of 1897, paragraph 415, I believe it is, which provides for the payment of 67 cents per ton on all foreign coal imported into the United States on which duty has been paid, which is laden on American bottoms bound for foreign countries, for fuel, the amount of drawback so claimed to be paid to the vessel—or the amount of duty, rather, which is the same thing.

Q. That is paid by the owner of the vessel into which the coal is laden for fuel purposes?

A. Yes, sir; and under the tariff act of 1909, paragraph 418, a duty of 45 cents per ton is levied, which is returned to the ship under the same conditions.  
[242—188]

Q. That is, the custom duties are returned, in so far as they relate to the coal upon which it is paid, and which is subsequently laden into an American registered vessel foreign bound, and to be used for fuel purposes?

A. To be used for fuel purposes, yes.

Q. Did you also make an examination of the books, papers and records of the Western Fuel Company for the purpose of ascertaining the quantity of coal which the Western Fuel Company claimed it had sold and delivered to these various boats upon which drawbacks had subsequently been claimed?

A. Not as one item, but I did make an examination as to the entire amount of sales during that period.

Q. Did you, as a result of these examinations and investigations to which you have referred, make calculations for the purpose of determining the shortage, if there was any shortage, between the invoiced

(Testimony of W. H. Tidwell.)

weight and the out-turn weight of cargoes of coal imported by the Western Fuel Company into the United States between those two dates?     A. I did.

Q. And did you likewise make computations for the purpose of ascertaining and establishing the quantity of foreign coal received from all sources by the Western Fuel Company during the same period of time?     A. I did.

Q. Did you also make an examination of the records of the Western Fuel Company, such as were available, for the purpose of ascertaining the quantity of foreign coal on hand and in [243—189] the possession of the Western Fuel Company on the first day of April, 1906?

A. I examined a record which was presented to me by Secretary Norcross.

Q. And which purported to state the coal on hand on that date, that is, the foreign coal?     A. Yes.

Q. Did you also make an examination of the records of the Western Fuel Company for the purpose of establishing the quantity of foreign coal sold by the Western Fuel Company between the first day of April, 1906, and the 31st day of December, 1912?

A. I did.

Q. And did you also make an examination of their records for the purpose of ascertaining the quantity of foreign coal which was upon hand on the 31st of December, 1912?

A. I made no specific examination as to the amount on hand at that particular time, but I accepted the statement of Mr. Norcross as to the amount on hand

(Testimony of W. H. Tidwell.)

at that particular time.

Q. That is, that was on hand on that date; is that correct?     A. Yes.

Q. And did you, as the result of that examination, ascertain whether there was any difference between the quantity of foreign coal which the Western Fuel Company had received during that period of time, added to the quantity of coal which it had on hand on the first day of April, 1906, and the quantity of foreign coal sold by the Western Fuel Company between April 1, 1906, and December 31, 1912, plus the amount of coal then on hand?

Mr. STANLEY MOORE.—I would like to make this suggestion: Does that question have reference to the amount of coal received by the Western Fuel Company from April 1, 1906, to December 31, 1912, by custom-house weight, or what? [244—190]

Mr. ROCHE.—By both custom-house weight and also by invoice weight.

A. I made a computation showing both the invoice weight and the ascertained weight, or the weight upon which duty had been paid.

Q. By the way, during that examination, Mr. Tidwell, did you ascertain whether portions of cargoes of coal imported into the United States had been purchased by the Western Fuel Company and discharged into its bunkers?

A. The records of the company show that many smaller purchases were made, not full cargoes.

Q. In determining the weight of portions of cargoes purchased or received by the Western Fuel

(Testimony of W. H. Tidwell.)

Company, that is, of imported coal during that period of time, did you take the out-turn weight or the invoice weight?   A. You mean of partial cargoes?

Q. Yes.

A. I used one weight for both the invoice and the out-turn weight.

Q. And that was the out-turn weight?

A. That was the out-turn weight, according to their records.

Q. Of course, it was impossible for you to make any calculation upon the invoice weight, because of the fact that the Western Fuel Company only received a part of the cargo?

A. It only received a part of the cargo, and it might have been purchased from various people, for instance it might have been purchased from the Pacific Coast Company and other dealers, and there was no way of determining on what particular vessel that coal was imported.

Q. So, so far as that part of the cargo was concerned, you were obliged to, and in fact you did assume that the out-turn [245—191] weight was correct in making the calculation?   A. Yes.

Q. And that the Western Fuel Company only received that quantity of coal indicated by the out-turn weight?   A. Yes.

Q. Did you examine the books and records of the Western Fuel Company for the purpose of ascertaining the various places to which foreign coal thus imported by it between these two dates would be distributed?



(Testimony of W. H. Tidwell.)

A. The principal points were San Francisco and Oakland. Some was sold at San Diego. I think there was one or possibly two cargoes at Los Angeles. I think there was one at Santa Barbara and one at Eureka.

Q. Did you also examine the records of the Western Fuel Company for the purpose of ascertaining the quantity of coal which the Western Fuel Company claimed it had sold to the owners of various vessels?

A. Laden on barges, do you mean?

Q. Yes, first laden upon barges?      A. I did.

Q. Including, of course, to American registered vessels, foreign bound, upon which subsequently drawbacks were claimed?      A. Yes.

Q. And did you in that connection likewise make an investigation of records disclosing the quantity of foreign coal loaded from time to time on transports and boats belonging to the United States Government?      A. I did.

Q. I would like to have you go on in your own way, Mr. Tidwell, so that I will not be compelled to put a leading question to you, and state the character of the calculations made by you.

A. In what is known as Exhibit "A," we first took into consideration [246—192] the amount of coal on hand on the first day of April, 1906; then by months added to that amount, arriving at the total amount which it received throughout each month during that particular period, indicating the invoice number, the name of the vessel on which the coal was

(Testimony of W. H. Tidwell.)

imported, or from whom the coal was purchased, the invoice weight, the ascertained weight, the shortage or overage, if any, finally arriving at the totals of the amount received from April 1, 1906, to December 31, 1912.

Q. Now, before you refer to any other exhibit, Mr. Tidwell, I want to call your attention to a statement which is marked Exhibit "A," entitled "Statement showing coal on hand April 1, 1906, and the receipts of coal from all sources by the Western Fuel Company from April 1, 1906, to December 31, 1912"; this exhibit was prepared, was it not, under your direction and at least in greater part by yourself?

A. I should say that practically every figure on it had been noted by me, because I checked it several times.

Q. This is the exhibit, of course, to which you have just referred; is that correct, Mr. Tidwell?

A. Yes, Exhibit "A."

Q. I notice that the first item, so far as figures are concerned, appearing on the first page of this exhibit, is as follows:

"Balance, April 1, 1906, 25,258 tons"; what does that indicate?

A. That amount was shown by this sheet of the Western Fuel Company which has not been produced.

Q. That indicates the quantity of foreign coal on hand, in the possession of the Western Fuel Company, in the State of California; is not that correct?

A. Well, it is presumed to be in the State of Cali-

(Testimony of W. H. Tidwell.)

fornia; it is [247—193] in the possession of the Western Fuel Company, taken up by the offices of the Western Fuel Company of San Francisco, and shown to be on hand at this depot.

Q. And that, of course, would include the coal on hand at Oakland?

A. Yes, Oakland and San Francisco.

Q. And you understand, or did understand from the records of the Western Fuel Company, that whatever coal may be entered through the port of San Diego—

Q. (Intg.) That is not included in that balance at all. The coal entered at San Diego was sold by the shipload, as I understand it.

Q. Now, directing your attention to this exhibit, so that the record may show exactly to what it refers, in the upper left-hand corner appears the words, "Entry number"; immediately under that, and under the word "balance," to which I referred a few moments ago, appears "1906, April"; this exhibit shows, does it not, in months, in calendar months, all foreign coal imported by the Western Fuel Company? A. Yes, sir.

Q. And the numbers appearing, other than the date, upon the extreme left-hand side of each page of this exhibit, indicates the entry number?

A. The entry number on which the coal was entered for duty.

Q. And that is the entry number at the United States Custom-House at the port of San Francisco?

(Testimony of W. H. Tidwell.)

A. Yes, and those entries are here as a part of the exhibit in this case.

Q. In the second column appears what?

A. The name of the vessel on which the coal was imported, or the party or the concern from which the coal was purchased.

Q. And the third column indicates what, under the title, "Invoice [248—194] weight, tons"?

A. The consular invoice, or the commercial invoice of the concern from which the company purchased the coal; it is the weight upon which it was purchased by the company.

Q. There were introduced in evidence yesterday, Mr. Tidwell, a number of invoices, as well as a number of bills of lading; the invoices which are referred to in this exhibit were the invoices which were introduced in evidence yesterday; is that correct?

A. In so far as it pertains to consular invoices; no invoices of coal purchased locally by the Western Fuel Company in small lots have been introduced in evidence; they are not in the possession of the Government.

Q. In other words, you mean in partial lots?

A. In partial lots.

Q. And, as you have already testified, in so far as those partial cargoes or lots are concerned, you have taken the out-turn weight as being the true and correct weight?

A. Yes, that was accepted from the statements furnished by the Western Fuel Company as being correct.

(Testimony of W. H. Tidwell.)

Q. And it is also true, is it not, Mr. Tidwell, that in every instance the invoice weight, which you refer to, the consular invoice weight and the bill of lading weight agree?     A. Yes.

Q. And the invoice weight, of course, is the weight of the coal at the country of exportation?

A. Yes.

Q. So in the third column you have the invoice weight, which is also, as you have testified, the bill of lading weight?     A. Yes.

Q. The fourth column is entitled "Ascertained weight"; that means, does it not, the out-turn weight?

A. The out-turn weight at San Francisco. [249—195]

Q. That is the weight of the coal as weighed upon the discharge of the vessel at San Francisco?

A. Yes.

Q. And it is a fact, is it not, Mr. Tidwell, that it was upon the ascertained weight or the out-turn weight that duties were paid to the United States Government; is that correct?

A. Yes, except in a few instances of dispute, where there were great shortages, in which the Western Fuel Company or the importer paid on the invoice weight.

Q. That is, where the liquidated weight was by the collector made the invoice or bill of lading weight; is that correct?     A. Yes, sir.

Q. In the next column, which is entitled "Short tons and pounds" is inserted the amount of short-



(Testimony of W. H. Tidwell.)

age, if there was any shortage, the difference between the invoice or bill of lading weight and the out-turn weight at the port of San Francisco? A. Yes.

Q. And in the next column, which is entitled "Over, tons, pounds" is inserted the excess above the invoice or bill of lading weight, and between that and the out-turn weight? A. Yes, sir.

Q. In other words, for the purpose of illustration, if the invoice weight was 5,000 tons and the out-turn weight at San Francisco, when the coal was discharged, was 5,100 tons, under this column to which I am now directing your attention there would be 100 tons, which would indicate the excess weight or overage; is that correct? A. That is correct, yes.

Q. In the last column, which is contained upon each one of these sheets is the word "Anthracite, tons, pounds"; that refers to coal upon which no duty was paid, does it not?

A. That is my remembrance about that, that anthracite was not [250—196] dutiable under the tariff.

Q. And for that reason you deducted the quantity of anthracite coal in this computation for the purpose of evening up the cargoes?

A. As a matter of fact, Mr. Roche, I put it there for convenience, simply, whether there would be any question whether it was dutiable or not dutiable. It really cuts no figure in the tabulation.

Q. And that same explanation would apply to each page of the exhibit, would it? A. Yes.

Q. And this exhibit does contain a reference to

(Testimony of W. H. Tidwell.)

every cargo of foreign coal that was imported in the State of California, outside of San Diego, by the Western Fuel Company, between April 1, 1906, and the 31st day of December, 1912, and inclusive of both of those dates?

A. It goes a little further than that, Mr. Roche; it also includes whole cargoes which were purchased by the Western Fuel Company from other importers as well as that imported into the port of San Diego. For instance, Hind, Rolph & Company, J. J. Moore & Company and others imported whole cargoes which were sold direct to the Western Fuel Company; it also includes those. That is a statement of all the coal received by the Western Fuel Company; that is the out-turn weight of all the coal received by the Western Fuel Company during that period.

Q. And upon which duty was paid?

A. And upon which duty was paid.

Q. It also includes, does it not, the invoice weight of coal received by the Western Fuel Company upon the occasions when the Western Fuel Company would purchase an entire cargo?

A. Yes, either an entire cargo or a part of a cargo.

Q. In so far as the part of a cargo was concerned, does it also [251—197] show the invoice weight?

A. It shows the invoice weight to be the same as the purchase weight.

Q. The last sheet of this exhibit—

(Testimony of W. H. Tidwell.)

Mr. DUNNE.—Mr. Roche, before you get to the last sheet, I would like to ask what does he mean by these initial letters, for instance “A,” “B,” and so forth. For completeness sake, he might explain that.

A. That refers to several invoices, or rather, several entries on which that coal was made, marked 4369 A and B.

Mr. ROCHE.—I think, Mr. Dunne, that entry 4369 A and B was the invoice which I read into evidence and to the jury yesterday.

Q. In other words, where there are two invoices in a case such as that, it would indicate that a part of the cargo was taken on at one point and part at another; is not that correct? A. Not necessarily.

Q. Do you recall that particular shipment, Mr. Tidwell?

A. No, I don't recall that particular shipment.

Q. For the purpose of illustration, if part of a cargo were taken on at Nanaimo and the boat completed the cargo at Ladysmith, and both portions of the cargo were consigned to the Western Fuel Company, there would be two invoices, would there not?

A. Yes. I can explain it, if you will pass me the entry.

Q. The entry, itself?

A. Yes, the entry and the invoice.

Mr. DUNNE.—Mr. Roche, I did not mean to interrupt the examination to this extent.

Mr. ROCHE.—Oh, that is all right. I think it might be advisable at this time for the witness to ex-

(Testimony of W. H. Tidwell.)

plain the entry. This is the entry, Mr. Tidwell, which I read into evidence yesterday (handing).  
[252—198]

A. In this instance, it refers to two invoices; one No. 4369A, of 2115 tons of coal from Ladysmith; the other refers to invoice No. 4369B, of 3686 tons of coal from Nanaimo.

The COURT.—Q. Making one cargo?

A. Making one cargo of 5,801 tons.

Mr. ROCHE.—Q. Those were the two invoices, Mr. Tidwell, which I read into evidence yesterday, and which were explained to the jury; but it quite frequently happens, does it not, Mr. Tidwell, that a cargo loaded upon a ship at one port may be consigned to two or more persons, that is, half the cargo to one and half the cargo to the other, and in that case, too, there would be two separate invoices, as well as two separate bills of lading?

A. And would also be two separate entries.

Q. In other words, each consignee would have to make a separate entry?     A. Yes.

Q. And in that case there would be two invoices?

A. Yes, sir, two invoices.

Q. The last page of this Exhibit "A" to which you have referred is a statement entitled as follows: "Summary showing total invoice and ascertained weights of coal on hand and received by Western Fuel Company from April 1, 1906, to December 31, 1912; also Total Shorts and Overs"; in other words, the table which is contained upon the last page, being page No. 40 of this exhibit, shows the total weight

(Testimony of W. H. Tidwell.)

for each year, of each invoice relating to the cargo of coal which was received by the Western Fuel Company into this port, whether consigned to it or consigned to somebody else and sold to it; is not that correct?

A. Yes; you should have said in your question, all invoices in a particular year, instead [253—199] of each invoice in a particular year.

Q. In other words, the first column refers to the year? A. Yes.

Q. And the second column refers to the invoice weights of all cargoes received by the Western Fuel Company for that particular year?

A. For that particular year, yes.

Q. That is in tons and pounds?

A. In tons and pounds.

Q. In the third column relates to the out-turn weight? A. The out-turn weight, yes.

Q. And the fourth column contains a total for each year of the shortages? A. Yes.

Q. And the fifth column contains a total for each year of the overages? A. Yes.

Q. And the "shortage" refers to the difference between the out-turn weight and the invoice or the bill of lading weight, that is to say, where the out-turn weight is less than the invoice or bill of lading weight? A. Yes.

Q. And the word "overages" refers to where the out-turn weight is in excess of the weight as shown by the invoice or the bill of lading? A. Yes, sir.

Q. That is to say, in the case that I have last re-



(Testimony of W. H. Tidwell.)

ferred to, the overage is where the out-turn weight exceeds the invoice or bill of lading weight, and under the word "short" it is where the out-turn weight is less than the invoice or bill of lading weight?

A. Yes.

Mr. ROCHE.—I would like to have it understood that this exhibit is actually read into evidence.

\* \* \*

Mr. DUNNE.—Mr. Roche, before you offer it in evidence, will you ask Mr. Tidwell what he means by "O 17" on the first page? [254—200]

Mr. ROCHE.—What does that mean, Mr. Tidwell? A. Oakland, Entry No. 17.

Q. And what does "S D" mean?

A. San Diego.

\* \* \* \* \*

Q. Will you indicate at this time, Mr. Tidwell, so we may have your answers in the record, exactly what papers you used and what records were resorted to by you for the purpose of making your computations upon which this Exhibit "A" is based?

A. The first record that I had from the Western Fuel Company was their vouchers showing payments for coal; next, the monthly statements showing coal received; and also the custom-house entries and invoices.

\* \* \* \* \*

Mr. DUNNE.—I presume, Mr. Roche, that Mr. Tidwell will testify that these computations are correctly made.

Mr. ROCHE.—Yes.

(Testimony of W. H. Tidwell.)

The WITNESS.—Yes, I will testify to that.

Mr. ROCHE.—The total weight, according to the invoices, of all cargo, would be as follows: 2,159,551 tons, 1,147 pounds.

Mr. McCUTCHEN.—That is the invoice weight.

Mr. ROCHE.—That is the invoice or bill of lading weight. The invoice weight and the bill of lading weight agree on all cargoes. The out-turn weight, that is, at the port of discharge, is 2,138,831 tons, 473 pounds. The shortage—

Mr. McCUTCHEN.—Mr. Roche, have you the percentage of difference there?

Mr. ROCHE.—No, we have not.

Mr. STANLEY MOORE.—It is nine-tenths of one per cent. [255—201]

Mr. ROCHE.—Of course, that is not accurate, for this reason.

\* \* \* \* \*

Mr. ROCHE.—Q. Let me ask you, Mr. Tidwell, in that connection: You have already testified that in some instances the Western Fuel Company received only a part of a cargo. A. Yes.

Q. That is, if a cargo of coal were destined or consigned to some third party in San Francisco or elsewhere, and part of that coal would be sold to the Western Fuel Company and the remaining part of that cargo to some other company or other companies; that is a fact is it not? A. Yes.

Q. It is also true, is it not, that in a great many of these instances there would be a shortage between what is known as the invoice or bill of lading weight

(Testimony of W. H. Tidwell.)

and the out-turn weight; that is correct, too, is it not? \* \* \*

A. I could only assume that that is true; I don't know what the original weight of a cargo would be.

Q. And, of course, the only way you could ascertain that to be true is by taking the out-turn weight of a part of cargo which was sold to the Western Fuel Company and following up and checking that part of the cargo which was sold to some other person, firm or corporation; is not that correct?

A. Yes.

\* \* \* \* \*

Q. And, of course, the out-turn weight of the coal delivered to the Western Fuel Company, plus the out-turn weight of the remaining part of the cargo would show the out-turn weight of the entire cargo?

A. Yes, sir.

Q. And a comparison between that out-turn weight and the invoice [256—202] or bill of lading weight would show whether the weights tallied or whether there was a shortage, or an overage; is not that correct? A. Yes.

Q. Now, as I understand your testimony, in each instance where the Western Fuel Company purchased only a part of a cargo, instead of following that out and ascertaining whether there was a shortage, by adding all of the out-turn weights together and comparing the total result with the invoice or bill of lading weight, you had to take the out-turn weight of the coal delivered to the Western Fuel Company as the true and correct weight.

(Testimony of W. H. Tidwell.)

A. Yes, and in so far as the percentage was concerned I gave them the benefit of it in that way.

Q. And, of course, that had to be done by you because in a case where there was a shortage and two or more persons purchased parts of the cargo it would be impossible for you to tell where the shortage occurred, and the exact amount of shortage that ought to be charged up against the Western Fuel Company or that ought to be charged up against the other vendees; is not that correct?

A. That is true.

\* \* \* \* \*

A. (Continuing.) And in addition to that, there were many instances where it was impossible to tell by whom the coal was imported. The Western Fuel Company made many purchases of 1,000 lbs. or 500 lbs., or of 10 tons, or of 20 tons,—in one instance, with the Pacific Coast Company, it was something over 18,000 tons, and it is impossible to tell the names of the vessels on which that coal was imported, or the out-turn weight of the particular vessel; it was absolutely necessary to assume that the invoice weight was the same as the out-turn weight. [257—203]

Q. So that in each one of these instances you simply set the out-turn figures down here as the actual weight; is that correct? A. Yes.

\* \* \* \* \*

Mr. ROCHE.—The total shortage shown by the exhibit is 26,044 tons, 1965 lbs.; the total overage is 5324 tons, 1291 lbs.

Q. The actual shortage, Mr. Tidwell, of course,

(Testimony of W. H. Tidwell.)

would be the difference between the 5324 tons, 1291 lbs. overage, and 26,044 tons, 1965 lbs. shortage; is that correct?

A. Yes, sir; that is correct; that would also be the difference between the invoice weights and the ascertained weights.

(The document was here marked "U. S. Exhibit No. 125.")

Mr. DUNNE.—Q. And thus your last statement contains a calculation of the net shortage; it is 20,720 tons out of a total of about 2,160,000 tons?

Mr. ROCHE.—Now, may it please the Court, counsel seem to think it is necessary to repeat that at every turn.

The COURT.—Yes. It does not seem to me to be at all necessary to repeat this every time it is mentioned, gentlemen.

**[Testimony of Daniel J. Moynihan, for the Government.]**

DANIEL J. MOYNIHAN, called for the United States and sworn, testified as follows:

Direct Examination by Mr. ROCHE.

I live and have lived in San Francisco for a number of years. I am and have been for 18 years last past assistant weigher in the United States custom-house. I am and have been for a number of years familiar with the Folsom street bunker. I have had occasion from time to time during [258—204] the period that the Western Fuel Company has been engaged in business in San Francisco and in possession of the Folsom street bunker, to act as assistant



(Testimony of Daniel J. Moynihan.)

weigher of the custom-house in connection with the discharge of imported coal at that dock. I have frequently weighed coal upon the scales there. We used the rising beam in ascertaining this weight. That practice has been invariably followed by me, and it was the practice followed with reference to all weighing that went on under my observation there.

Q. Now, what do you mean by a rising beam?

A. Well, the beam when in the frame is locked, and you have to ascertain your weight—the beam wants to come from the bottom up and pass the center, as close to the center as possible, instead of from the top down.

\* \* \* \* \*

Q. In what position is the beam when the coal is weighed by what is known as an even beam?

A. Well, they never weigh on an even beam.

Q. I understand that, but I want to know in what position the beam is when anything is weighed upon a scale with an even beam; the beam is horizontal, is it not? A. Yes.

Q. Well, you say that the coal was always weighed with what is known as a rising beam. About how far above the horizontal would the beam be when the coal would be weighed with what is known as a rising beam?

A. The beam is really never stationary when you are weighing; it is on the ascendancy and it comes past the center and is supposed to fall back as near the center of the beam as possible.

Q. Has it ever been your practice or the practice

(Testimony of Daniel J. Moynihan.)

of any United States weigher in weighing coal upon that dock upon what you understand to be and what you have testified to be a rising [259—205] beam, to weigh the coal only when the beam has reached the top or gets to the top of the scale? A. No.

Q. In weighing the coal upon what is known as a rising beam, how close to the horizontal is the beam?

A. It is supposed to be as near the center as possible when the weight is made; but it is practically moving in the course of weighing it all the time so quickly.

Two cars were weighed on the scales at a time at Folsom street. A tare weight would be taken of the cars at least once a day. These two cars would approximately weigh about 9,000 pounds. The gross weight of the cars and coal would be 20,000 pounds, approximately. The net weight of that coal would, therefore, be about five long tons, 2240 pounds to the ton.

Q. Are there any notches upon the beam or either one of the two beams contained upon the scales in the Folsom street dock scales?

A. The upper beam has notches, 500 lbs. and 1,000, as I remember, and the lower beam is indicated by 5 lbs. It has a sliding poise with no notches in it, just the marks in it.

Q. Well, in weighing this coal, of course, you practically have the poise, so far as the large beam is concerned already fixed that weighs simply every 500 lbs.? A. Yes.

\* \* \* \* \*

Q. With what beam do you ordinarily do your

(Testimony of Daniel J. Moynihan.)

weighing, so far as the adjustment of the poise is concerned?

A. The upper beam you get your thousands, and for those under the thousand you take the fractional weight on the lower beam.

Q. You say that there are no notches upon the lower beam? A. No.

Q. How are the weights indicated upon the lower beam? [260—206]

A. Well, as a rule on the side there are indentations cut in, with the 5, 25 and 50 lbs., and the individual marks in between of 5 lbs. to 25 lbs. and so on.

Q. There is a mark indicating each 5 lbs. is that correct upon the smaller beam?

A. On the side, yes.

Q. And that side, of course, is presented to the view of the weigher? A. Yes.

Q. And the poise or what is known as the "P" is moved forward and backward for the purpose of getting the actual weight? A. Yes.

Q. In weighing this coal, before taking the weights, has the beam ever been horizontal? In other words, have you ever been obliged to move the "P" or poise backward in order to take the weight on the rising scale instead of having to wait for the beam to become even or horizontal?

A. Before starting in to weigh at all we balance the scale; that is, without anything on it, and we try to get the beam as near the center as possible in balancing it; that is, without anything on it, to show the scale is on an even balance, neither for or against.

(Testimony of Daniel J. Moynihan.)

Q. Now, I am asking you and talking about when you are actually weighing coal, of course, it becomes necessary for you, does it not, in weighing coal, to move this poise or "P" forward or backward upon the smaller beam?     A. Yes.

Q. Now, has it sometimes happened that in moving to move the poise or "P" backward so as to take the weight upon the rising beam instead of taking the weight upon the horizontal or even beam?

\*       \*       \*       \*       \*       \*       \*       \*

A. We gently throw the poise over; the beam should be down, and [261—207] then we shift it back to allow it to rise.

Q. Now, how far back do you have to shift, or how far back has it been your practice to shift that "P" or poise in order to take the weight upon the rising beam?

A. Till it leaves the bottom gently; judging according to the weight—the judgment is there, you can see the beam, it is pretty hard to say.

Q. Now, has it sometimes happened that in moving or shifting this "P" or poise back the scale would come up from the bottom to a horizontal position?

A. Well, the beam is practically moving up and down; that is, you don't wait to have it come to a stop at a horizontal position.

Q. Do you continue to shift or move back the "P" or poise until the scale rises or starts ascending above the horizontal or even position?

A. You shift the poise until it leaves the bottom with the gentleness that you figure is practical, would

(Testimony of Daniel J. Moynihan.)

practically mean the center, if you gave it time to stop.

Q. That is, it would ultimately reach the horizontal if you gave it time to stop there; is that correct?

A. As a rule it would reach above the horizontal and come up to the center.

Q. Is that the position in which the beam is at the time the weight is taken?

A. That is, it has left the bottom and is varying between—

Q. (Intg.) The top and the bottom? A. Yes.

\* \* \* \* \*

Q. Now, have you ever endeavored to shift this “P” or poise backward after the beam reached a horizontal position so as to take the weight upon a rising beam above the horizontal position? [262—208]

\* \* \* \* \*

A. The rising beam above the horizontal position—no, sir.

Q. Did you ever at any time while weighing coal permit the beam when the weights were taken, to so rise that it would adhere to or rest against the top of the scale-beam or the beam-frame? A. No.

Q. Will you repeat again in your own language in what position the beam is at the time the weight is actually taken?

\* \* \* \* \*

A. The beam has left the bottom of the frame and has started to ascend with practically a poise that would ultimately leave it close to the center as pos-



(Testimony of Daniel J. Moynihan.)

sible, although the beam is still moving when the weight is taken.

Cross-examination by Mr. STANLEY MOORE.

I belong to the department of the Surveyor of the port in the Custom-house of San Francisco. My duties during that time included the weighing of imported articles and merchandise generally as well as coal. There are, I believe, 24 assistant weighers in all. These weighers are shifted around from ship to ship and from wharf to wharf. This shifting is at the pleasure of the weigher, Mr. Dougherty (over whom the Surveyor of the Port has jurisdiction), so that I may be weighing coal on the Folsom street dock one day, and the next day I may be over on some other dock weighing something else. Two or three weighers may work on the same job at different times, that is, during the unloading of the same ship. The first thing we do in respect to the scales, when unloading a ship, is to balance the beam, so as to see that the scales are as nearly as possible correct. The tares of the cars are taken as often as the weigher thinks it necessary to check them, but at least once a day. [263—209] The cars are all iron. They vary in weight somewhat with the weather conditions. If it was raining, the fine coal would stick to the car. The state of the weather and of the coal has something to do with the frequency with which the tare weight is taken. The unloading of a ship goes on just the same in wet as well as any other weather. Four hatches are sometimes working on a vessel when she is discharging. They generally attempt

(Testimony of Daniel J. Moynihan.)

to work the four hatches at full operation in shore. I should imagine that one of those vessels working four hatches would discharge practically 30 to 40 tons per hour per hatch, or 160 tons in all per hour. The whole operation goes forward with considerable speed. The weighing of the two cars takes a very short time. It is done very quickly. As a rule, the beam is not still during the process of weighing. They do not wait for the beam to get steady before taking weight. When a car comes on the scales we adjust our 500 pound scale and carry the poise over so that the beam is down, and then I move my hand back, and when the beam commences to rise I take the weight. Then I clamp something down that arrests the whole proceeding.

Q. When you first begin the weighing, as I understand you, you carry the poise over until the beam is all the way down; is that correct? A. Yes.

Q. Now, do you know whether or not when you have that beam all of the way down on that scale that is weighing 20,000 lbs. at a time and commence to take it back, how many lbs. it takes, whether 5 or 10 or 20 or 30, to break the beam to cause it to rise, or 50—do you know?

A. No, I don't know. [264—210]

Q. You don't know? A. No.

Mr. MOORE.—It is suggested, or 100, but if the witness don't know it is no use of asking him.

The COURT.—You might as well run it up to a thousand.

Mr. STANLEY MOORE.—Q. At all events, Mr.

(Testimony of Daniel J. Moynihan.)

Moynihan, the process is that you first carry the poise over until the beam is clear down, and then you move that thing back with your hand until the beam breaks and rises; isn't that correct?

A. Till the beam rises to as close to attaining a final center as possible.

Q. You just illustrate with your hand the motion that you make after you have moved the poise over until the beam is clear down and when you start back, to break the beam and cause it to rise. Just illustrate with a movement of your hand how you do it and how rapidly you do it?

A. It is pretty hard; it is pretty hard to illustrate that without the beam and the tension to work against.

Q. I understand that, but isn't it a pretty quick movement when you bring your hand back and break the beam and cause it to rise?

A. In throwing it over to cause the beam to come down is a quick movement, but coming back is not—more carriage used in bringing the poise back.

Q. You pass your hand right steadily, do you not, as a general rule?      A. You hit the poise slightly.

Q. Sir?

A. You touch the poise slightly till it starts in to move on the way back.

Q. And then you put over that clamp that arrests the whole proceeding, and take the reading, do you not?      A. Yes.

Q. Who reads that off?

A. The weigher. [265—211]

(Testimony of Daniel J. Moynihan.)

Q. That is to say, if you are weighing there for the Government it would be made by you, the assistant weigher that was on the particular job? A. Yes.

When I am up there weighing at Folsom street a representative of the Western Fuel Company is present. The ship may have a representative there too, and the Australian ships usually are thus represented by a clerk. The Western Fuel Company's own ships, coming from the north, do not have a representative.

(Conceded by the prosecution that the type of scales used at the Folsom street docks are the Fairbanks-Morse.)

In the method of weighing the process is very quick, and the beam, after you begin the backward motion to cause it to rise, practically never becomes stationary before the weight is taken.

BE IT REMEMBERED that thereupon the following testimony was given and that the following proceedings occurred:

Redirect Examination by Mr. ROCHE.

Mr. ROCHE.—Q. What do you mean by practically not?

A. Well, you don't wait to have it actually stop, if you think you have ascertained the weight from the motion of the beam.

Q. In other words, the beam does not become perfectly stationary; that is what you mean, is it not?

A. Yes, sir.

Q. To what extent is that beam moving above and

(Testimony of Daniel J. Moynihan.)

below the horizontal at the time the weight is actually taken?

A. The beam in leaving the bottom is supposed to rise above the center and come back as near to the center as possible. [266—212]

Mr. ROCHE.—Q. That is, to come back as near to the center as possible; now, can you state through what distance the beam is moving the horizontal at the time the weight is taken?

A. Well, I don't know exactly.

Q. Have you any knowledge whatever as to the distance between the bottom of the scale-frame and the top of the scale-frame where the beam moves up and down?

A. Well, possibly 3 inches; I would not say exactly but it is in the neighborhood of 3 inches.

Q. Would that be between the position that the beam would be in at the time the beam was down and the greatest elevation which the beam could reach?

A. Yes, practically.

Q. About 3 inches?      A. More or less.

Q. Has it ever occurred, in your experience as a weigher and while you were weighing coal, that at the time the coal would be weighed the beam would be resting up against the top of the frame?

A. No, sir.

\*      \*      \*      \*      \*      \*      \*

Q. You say that just before you commence taking the weights the beam is down?      A. Yes.

Q. And then you move the poise along so as to start the beam to rise?      A. Yes.



(Testimony of Daniel J. Moynihan.)

Q. Does it frequently occur that you have to shift the poise or move it back again in order to take the weight?

A. Yes, at times you might move it too quick and it would rise too rapidly; then you would have to go over the operation again.

Q. You have testified upon cross-examination that these weights are taken very rapidly; irrespective of how rapidly the weights are taken do you always give yourself sufficient time to take accurate weights?

A. Yes. [267—213]

Recross-examination by Mr. STANLEY MOORE.

Q. Mr. Moynihan, you have been weighing here you say 18 years; during a large part of that time there was no Western Fuel Company?

A. No, sir.

Q. How long has it been the practice in this port to your knowledge to weigh such commodity as coal with a rising beam?

A. It has always been the custom.

Q. Ever since you have had anything to do down there on the water front? A. Yes, sir.

Mr. DUNNE.—Q. Do you always give yourself sufficient time to make exact weights when you are weighing coal?

A. What do you mean by exact weights?

Q. Well, I mean just exactly what the word “exact” means; I mean precisely correct to the lb.

A. We follow the custom in vogue of taking the weight with a rising beam; we do not wait for it to stop.

Q. Will you just answer my question, understand-

(Testimony of Daniel J. Moynihan.)

ing what the "exact" means; do you always give yourself sufficient time in weighing coal to get precisely exact weights? Now, you can answer that yes or no, I think.

A. Well, I will answer it by stating that we take it on the rising beam, the beam is never steady as a rule when we take the weights; now whether that is exact or not—I don't really know to what point you are getting.

Q. As an experienced weigher do you mean to say that a weight registered upon a rising beam is a precisely exact weight to the lb.?

A. We never weigh as close as a lb. Our weights are never recorded less than 10 lbs. That is, on a 10-lb., decimal.

Q. Why don't you wait in that process for precisely exact weights? [268—214]

A. Well, we are following a custom that is handed down to us under orders to weigh within 10 lbs.

Q. Well, in plain English, Mr. Moynihan, if you were to wait for precisely exact weights in weighing coal when you are unloading ships, you could not do business, could you—the world has to move on, has it not?

Mr. McCUTCHEN.—There is no answer to that.

Mr. DUNNE.—I don't think it requires an answer.

Further Redirect Examination by Mr. ROCHE.

Mr. ROCHE.—Q. Mr. Dunne has asked you how close to an absolutely accurate weight you weigh the coal at the time the coal is weighed: I will ask you this question, in your judgment as a weigher, having

(Testimony of Daniel J. Moynihan.)

18 years experience, how close to the actual weight of the coal is the coal weighed when it is weighed by you upon a rising beam?

\* \* \* \* \*

A. We try to get it within the decimal of 10 lbs. over and under 5 lbs.

Mr. ROCHE.—Q. 10 lbs. over and under 5 lbs.; so that, in your judgment as an experienced weigher, the actual weight of coal would be within 10 lbs. of the weight taken upon a rising beam?

Mr. STANLEY MOORE.—That is objected to as calling for the conclusion of the witness and as not necessarily following from his other testimony.

The COURT.—The objection is overruled.

Mr. STANLEY MOORE.—We note an exception.

A. Yes.

Mr. ROCHE.—Q. And that is 10 lbs. in how much net weight of coal? [269—215]

The COURT.—About 5 long tons.

Mr. ROCHE.—Your Honor is correct in that statement.

Further Cross-examination by Mr. STANLEY MOORE.

Q. Is it not a fact that as an experienced weigher with a good deal of practice in weighing with these rising beams, you first take your poise here until the beam is clear down; that is correct, is it not?

A. Yes, sir.

Q. Then is it not a fact that generally as a practiced weigher you carry that poise back and when that beam commences to rise you take your weight—

(Testimony of Daniel J. Moynihan.)

generally?      A. Yes.

Q. Now, you don't know whether it takes 10 lbs. or 20 lbs. or 30 lbs. or 50 lbs. on those scales weighing 20,000 lbs. at a time to cause that beam to rise up when it is down, do you?

A. You are working on a beam of 500 lbs. with 5 lb. divisions, and you can tell pretty close.

Q. Well, I say no matter whether you are working on a beam of 5 lbs. or of 500 lbs. divisions, when your beams are down, and you are weighing 20,000 lbs., do you know what it takes to make those beams rise up and break, no matter whether it is graduated off into 5 lbs. or 10 lbs. or one lb.?

A. We can tell within practically the 10 lbs. or so by moving that poise two notches, 10 or 20 lbs. We can tell how it rises what action there will be.

Q. But I am talking about causing the beams to rise when they are clear down and there are 20,000 lbs. upon the scales; I ask you if it is not a fact that generally in weighing there, as an experienced weigher with a good deal of practice, that you did not carry back either one of those poises—back or forward very much, but you would have it back until the point was reached when the beam would commence to rise and then you [270—216] would take your weight; now, is not that the way that it was done?

A. Yes, sir.

**[Testimony of W. H. Tidwell, for the Government.]**

W. H. TIDWELL, being recalled for the United States, continued his testimony as follows:

Direct Examination by Mr. ROCHE.

I think I have been on the Folsom street bunkers five times. The first time I actually ascended the superstructure occurred shortly after the return of the first indictment. I think I have been on top of the bunkers four times in all. There was one visit when I did not go up. On the occasion of my first visit I spent about an hour on the top of the bunkers. That occasion was prior to the taking of photographs by Mr. Selvage. On this occasion of my visit, they were not discharging a vessel. I have, however, been on the bunkers when a vessel was discharging. I have visited the scales-house on the dock. I have looked in an easterly direction from the window in that scales-house for the purpose of ascertaining what could be seen through that window. I have done that at a time when coal was being weighed in the scales-house. I am familiar with the system pursued by the Western Fuel Company in discharging coal from ship to hoppers, and from hoppers to coal cars and in bringing said coal upon the scales and weighing it. On the occasion that I have referred to, when I was in the scales-house when they were discharging a vessel, the first hopper was 40 or 50 feet from the scales-house. I do not recall whether coal was then actually [271—217] being discharged through the chute from the bottom of the first hopper into the cars, but coal was actually being



(Testimony of W. H. Tidwell.)

discharged from several towers at that particular time. I could see practically nothing except probably the bottom of the cars, or the wheels of the cars under the first tower. So far as the chutes were concerned, it was impossible to see them from the scales-house. The discharge of the coal from the hoppers themselves could not be seen from my position. The United States weigher was at the scales upon the occasion of my visit. He was facing west, with the beam of the scales in front of him, and with his back toward the hopper and the bunker. As I remember it, speaking of the time when a ship was being discharged, the entire inshore bunker under which the north track passes was entirely open, in respect to the space between the two tracks. There was a beam on which rested the hopper, and on the both sides of this beam everything was open. The second track was also open. I mean by the second track the middle track. The third track, and I believe also part of second or middle track on the west side of the bunkers, were covered over partially. There was also a covering on the south side of the third track. There were a number of movable planks there, which were standing up against the south wall of the bunkers, which had not been put in place.

Mr. ROCHE.—May it please the Court, I understand that for the purpose of the record, the three exhibits or tables to which the witness' attention was called last Friday, have been marked United States Exhibit No. 125, Tables A, B and C?

(Testimony of W. H. Tidwell.)

Mr. McCUTCHEN.—But only one has been thus far offered. [272—218]

Mr. ROCHE.—Yes, but I will introduce the others in just a moment.

Q. The exhibit to which your attention was directed on Friday afternoon last, Mr. Tidwell, just before court adjourned, was called by me Exhibit “A,” but it has been written into the record as Table A of United States Exhibit No. 125; so that we may make the connection between this and the other exhibits, will you just state again very briefly what this exhibit contains and what it shows?

A. That is a statement showing all coal received, showing a statement of the invoice weights, the entry number, the name of the ship, the invoice weight, the ascertained weight, the shortage and the overs of all coal received by the Western Fuel Company from the first day of April, 1906, to and including the 31st day of December, 1912; and it also includes the amount on hand on April 1, 1906.

Q. It does show, does it not, Mr. Tidwell, each instance where there has been an overage between the invoice or bill of lading weight and the out-turn or discharge weight, as well as the shortage?

A. It does.

Q. Something has been said here about percentages. Did you calculate the general percentage of the shortage, taking into consideration every pound of coal received by the Western Fuel Company from every source between the first day of April, 1906, and the 31st day of December, 1912, and both of those

(Testimony of W. H. Tidwell.)

dates inclusive; and likewise including the partial cargoes of coal to which you testified the other day, and which you figured up on what is known as the out-turn weight?     A. I did.

Q. What was your percentage, with all of these elements included?

A. With all the elements included, it was a little less than one per cent.     [273—219]

Q. Did you also take into consideration, for the purpose of ascertaining the percentage of shortage, the weight of all the coal shown in Table A, Exhibit 125, after eliminating or deducting therefrom these partial cargoes to which you have referred, which you had estimated at the out-turn or discharge weight?     A. I did.

Q. Now, as I recall your testimony on Friday afternoon, Mr. Tidwell, you said that you likewise took into consideration coal which was purchased by the Western Fuel Company already discharged, and that you figured that at the actual weight given you?

A. Yes.

Q. In figuring the last percentage to which I have directed your attention in your calculation, you said you did eliminate these partial cargoes; did you also eliminate the coal thus purchased by the Western Fuel Company, the actual weight of which was given you by its representatives?

A. I don't know that I fully catch your question.

Q. Let me put the question to you in this way: For the purpose of ascertaining the percentage of shortage of full cargoes discharged at San Francisco de-

(Testimony of W. H. Tidwell.)

livered to the Western Fuel Company, did you make a calculation from which you eliminated these partial cargoes to which you have referred, and also the coal purchased locally by the Western Fuel Company?

A. I did.

Q. Now, I direct your attention to a sheet of paper which has been marked, and I ask you whether that sheet of paper shows that calculation? A. It does.

Q. Just explain, if you will, the calculation which is disclosed upon the sheet of paper which I have just handed you. That is in your handwriting, is it not, Mr. Tidwell? [274—220]

A. No, it is in the handwriting of Mr. E. M. Atkinson; it was prepared, though, under my direction.

Q. While counsel are looking at that statement, Mr. Tidwell, will you again explain, please, the reason why you had to take these partial cargoes at the out-turn weight, so far as that portion of the cargoes were concerned which were actually turned over to the Western Fuel Company.

A. For the reason that it was absolutely impossible to obtain the out-turn weights of those cargoes. As I stated the other day, to illustrate it, the Western Fuel Company would purchase in some instances 1000 pounds and it was absolutely impossible to determine when that coal had been imported, or in what vessel it had been imported, and so forth; in other instances, it purchased from the Pacific Coast Coal Company over eighteen thousand tons of coal; it would be practically impossible—or it would be impossible—to determine the out-turn of all of the



(Testimony of W. H. Tidwell.)

cargoes which represented that coal.

The COURT.—Q. You said 1000 pounds a moment ago.

A. Yes, sir.

Q. And you meant 1000 pounds, did you.

A. Yes, sir. There were sometimes purchases made of 500 pounds. There are very small amounts on the coal statement for a given month, coal which we purchased from some of the local dealers here.

Mr. ROCHE.—Q. And so far as a particular cargo is concerned, one-half of which or a portion of which was delivered to the Western Fuel Company and the remaining portion delivered to some other person, of course where a shortage occurred, it would be impossible to tell where that shortage existed, would it not?

A. As a matter of fact, we would not know at what time the particular coal was imported, or the vessel it came in, or anything like that. [275—221]

Q. Directing your attention to the statement which has just been shown to counsel for the defendants, I will ask you, Mr. Tidwell, to explain that calculation to the jury?

A. This statement represents the total amount of coal imported—not imported, but received, and on hand April 1, 1906, to December 31, 1912, amounting to 2,159,551 tons, 1147 pounds, from which has been deducted—

Q. Just a moment: That represents the total coal accounted for in Table A of United States Exhibit No. 125; is that correct?



(Testimony of W. H. Tidwell.)

A. Yes, sir, that is correct; from which was deducted 232,990 tons 519 pounds, which represents the partial cargoes which had been purchased by the Western Fuel Company, purchased or obtained by the Western Fuel Company, leaving a balance of 1,926,561 tons 548 pounds, on which there was a difference upon its receipt at this port, either a shortage or an overage.

Q. Just let me ask you one other question before you finish that calculation: The second figure which you gave us, and which you said represented partial cargoes of coal received by the Western Fuel Company, also includes coal purchased locally by the Western Fuel Company in small quantities, including from the Pacific Coast Coal Company?

A. Yes, sir, and the amount on hand on the first of April, 1906.

Q. And that weight, you took as absolutely correct?

A. Yes. The difference between these two amounts, the percentage amounts to 1.07 per cent.

Q. That is the percentage of shortage?

A. The percentage of net shortage.

Q. What did you say it was? A. 1.07 per cent.

A. And that calculation is based upon all of the imported [276—222] directly by the Western Fuel Company, between the two dates already referred to by you, taking into consideration the overages; is that correct?

A. Yes. I would like to state in connection with this, that there are many cargoes of coal, the percentage of which is considerably more than is shown by this statement; I recall one in particular, the

(Testimony of W. H. Tidwell.)

steamer "Dumbarton," she had on board, I think, four thousand and some odd tons, and she was short 409 tons, which was about nine or ten per cent.

Mr. McCUTCHEN.—What date was that?

Mr. ROCHE.—That was in 1905.

Mr. McCUTCHEN.—That is not within the period covered by this statement, is it?

Mr. ROCHE.—No.

Mr. McCUTCHEN.—Then why is the witness volunteering that? He has not been asked anything about it.

Mr. ROCHE.—Q. That date is correct, is it, Mr. Tidwell?

A. Yes.

Q. We will go into that when we have these exhibits.

A. I might say, though, that there are many within that statement which I cannot recall at the present time, which would represent anywhere from 2½ to 5 per cent shortages.

Q. Now, as I understand your testimony, Mr. Tidwell, while this does eliminate partial cargoes, and the coal on hand on April 1, 1906, and the coal purchased in small quantities locally by the Western Fuel Company, it does include each cargo of coal upon which there was an overage, that is, upon which or as the result of the discharge of which, more coal was received by the Western Fuel Company than was shown by the bill of lading or the invoice; is that correct? A. Yes, sir, that is correct.

Q. Have you also made any calculation in which

(Testimony of W. H. Tidwell.)

was included those cargoes alone upon which there was a shortage?   A. I have not. [277—223]

Q. Will you kindly make that calculation sometime today, please, so that we may have that calculation before the jury?   A. Yes.

Mr. ROCHE.—We offer this table in evidence; I suppose there is no objection to it.

Mr. McCUTCHEN.—I think not.

The WITNESS.—I would like to have it typewritten.

Mr. STANLEY MOORE.—Just a slight discrepancy between that and our figures; we figure it at 1.06 and he has it at 1.07.

Mr. ROCHE.—We will have this statement typewritten and the typewritten copy substituted for this copy. We will ask to have it marked United States Exhibit No. 125, Table D.

(Paper was marked U. S. Exhibit No. 125, Table D, and reads as follows:)

**[U. S. Exhibit No. 125, Table D—Statement Showing Percentage of Shortage in Coal, etc.]**

TABLE D.

“Statement Showing Percentage of Shortage in Coal Imported Into the United States by the Western Fuel Company from April 1, 1906, to December 31, 1912.

Invoice Weight as per	
Summary . . . . .	2,159,551—1147
Deduct sum of Out-	
right Purchases, in	
which Invoice	
Weight is stated as	
the same as ascer-	
tained weight . . . . .	232,990— 599
Invoice Weight of	
	<hr/>
Imports . . . . .	1,926,561— 548
	<hr/>
Shortage as per sum-	
mary . . . . .	26,044—1965
Overage as per sum-	
mary . . . . .	5,324—1291
	<hr/>
	20,720— 674
	<hr/>
Percentage of net Shortage	1 7/100

[Endorsed]: Table D. No. 5233 U. S. v. Howard et al. U. S. Exhibit No. 125. Francis Krull, Deputy Clerk.”

(Testimony of W. H. Tidwell.)

Q. Have you also prepared a calculation showing the total quantity of coal sold by the Western Fuel Company between April 1, [278—224] 1906, and December 31, 1912?

A. I have. The statement also includes the amount of coal on hand and the amount burned during that period.

Q. That is, it also includes the quantity of coal on hand on the 31st of December, 1912? A. Yes, sir.

Q. From what papers, documents and records of the Western Fuel Company was that calculation made?

A. It was first prepared from a statement which was prepared and handed me by Mr. Norcross, the secretary of the Western Fuel Company and afterwards checked by the monthly statement of coal sales at Oakland and San Francisco.

Q. And which monthly sales have already been introduced in evidence, and are now in evidence in this case? A. Yes, sir.

Q. You say that this calculation likewise includes some coal which was burned; where was that coal located and when did it burn, if you know?

A. I don't know where it was located, but I think it was burned in October, 1908.

Mr. ROCHE.—You will concede, gentlemen, that it was in October, 1908, will you not?

Mr. McCUTCHEN.—Yes, subject to correction.

Mr. ROCHE.—Q. In other words, there was no coal belonging to the Western Fuel Company that was burned in the conflagration of 1906, so far as



(Testimony of W. H. Tidwell.)

your knowledge goes?

A. No, sir, so far as I know.

Q. I direct your attention to what is designated Table B, and ask you if this exhibit contains the calculations to which you have already testified?

A. It does.

Q. And it shows the sales of coal for each year?

A. It shows the sales of coal for each month throughout the year.

Q. And also for each year?

A. The totals are given for each year throughout the period mentioned. [279—225]

Mr. McCUTCHEN.—Mr. Roche, the witness stated it showed sales at Oakland and at San Francisco; I suppose he means, really that it is intended to show all sales.

The WITNESS.—As shown by the records, the monthly statements of the Western Fuel Company of its Oakland and San Francisco depots.

Mr. ROCHE.—Q. In other words, all coal sold by the Western Fuel Company within that period was charged against either the San Francisco office or the Oakland office? A. Yes, sir.

Mr. McCUTCHEN.—Then this is intended to show all of the sales.

Mr. ROCHE.—Yes, that is correct.

The WITNESS.—But not at the mines.

Mr. McCUTCHEN.—Q. Well, all coal imported into California. A. Yes.

Mr. ROCHE.—Q. This statement shows that there were sold by the Western Fuel Company, be-

(Testimony of W. H. Tidwell.)

tween the two dates to which you have referred, 2,196,215 tons, 1847 pounds of foreign coal; that is correct, is it not? A. That is correct.

Q. In other words, this statement relates exclusively to foreign coal, and does not take in consideration the domestic coal?

A. Entirely; all figures prepared by me relate exclusively to foreign coal; none relate to domestic coal whatever.

Q. It also shows that during the fire of October, 1908, there were 326 tons of coal destroyed, that is, 326 tons of foreign coal? A. Yes, sir.

Q. And it shows a balance on hand as of December 31, 1912, of 4,286 tons, the amount of foreign coal on hand at that date was ascertained by you from the records of the Western Fuel Company—is that correct, from the inventory?

A. It was ascertained from Secretary Norcross; a written memorandum [280—226] was given me to that effect, which I have in my suitcase.

Q. So that this table B discloses that between April 1, 1906, and the 31st day of December, 1912, both of those dates inclusive, the Western Fuel Company sold 2,196,215 tons, 1847 pounds of coal?

A. That is correct.

Mr. ROCHE.—We offer this table in evidence; this will be marked Table B of U. S. Exhibit No. 125.

\* \* \* \* \*

Mr. ROCHE.—Q. Did you make any calculation between the amount of coal actually received by the Western Fuel Company during the period to which

(Testimony of W. H. Tidwell.)

your attention has been directed, including the coal on hand on the first day of April, 1906, and the total sales of foreign coal between those two dates, including the coal on hand on the 31st day of December, 1912, plus the amount of coal burned during the month of October, 1908?

A. I prepared no specific statement on that, but in deducting the amount of coal received from the amount sold it equals—I can not recall the exact figure, but approximately 62,000 tons.

Q. In other words, the Western Fuel Company sold some 62,000 tons more foreign coal during the period of time to which you have referred than its records show it actually received?

A. That is true.

Q. Of course, that includes the coal on hand on the 31st of December, 1912?      A. Yes, sir.

In the course of my investigations, as above outlined, I had occasion to examine the day-books or diaries kept by the defendant Mills. I am familiar with the contents of those books in a general way, and with the system of bookkeeping pursued therein. I have compared the entries in those books with the invoice and bills of lading of the cargoes to which the entries refer, and I have also compared the entries in those books [281—227] with the discharge or out-turn weight of foreign coals imported by the Western Fuel Company into this country. I have made a comparison between the figures contained in the Mills books and the drawback claims made against the United States for the re-

(Testimony of W. H. Tidwell.)

turn of import duties.

I have prepared a table showing the quantity of coal discharged from time to time upon barges, either under the control of or operated by the Western Fuel Company or the Western Transport Company, from the offshore bunker of the Folsom Street dock and afterwards laden on vessels. In preparing this table I have taken into consideration the books kept by the defendant Mills. Indeed, the statement was prepared from those books wholly. I made a comparison between the drawback entries or claims against the United States Government and the books of the defendant Mills, and found that they tallied.

Q. Did you also make a comparison between the records kept by the Western Fuel Company, as to the quantity of coal deposited from time to time in certain compartments or pockets of the offshore bunker and the quantity of coal laden upon barges from those compartments or pockets? \* \* \*

A. I made an examination as to one, only, which was placed in evidence on Friday.

\* \* \* \* \*

Q. Did you also make a comparison between the figures kept in the books of the defendant, Mills, and certain other records of the company for the purpose of ascertaining whether they tallied, so far as the quantity of coal which Mills' books disclose was taken by those barges from time to time out of the compartments or pockets of the offshore bunker?

\* \* \* \* \*

(Testimony of W. H. Tidwell.)

A. I think that I referred to that a few moments ago; I only saw one of those statements; I only had one in my possession. It was placed in evidence on Friday, showing you how much coal had been discharged from, I think it was the steamer "Titania," and placed into various barges and compartments, which was also testified to by Mr. Hahn; I think that is the only one I saw, of that particular character of statement.

Mr. ROCHE.—Q. Do you recall whether the figures in that exhibit tallied with that transaction, so far as the defendant Mills' books were concerned, in which entries were made regarding that transaction? A. Yes, sir.

Q. State to the jury the system that was pursued by the defendant, Mills, in keeping this diary?

\* \* \*

Q. I direct your attention to the diary of 1906. Will you turn to the month of April, in that diary, and look at the entries which first appear in that diary after the first of April, 1906?

\* \* \* \* \*

Q. Will you explain to the jury, Mr. Tidwell, the system pursued by the defendant, Mills?

A. April 1st was Sunday, consequently April 1st does not appear, it is April 2d.

Q. Will you explain to the jury the system pursued by the defendant, Mills, in making those entries and keeping those books?

\* \* \* \* \*

A. If I may, I will answer that first by asking a



(Testimony of W. H. Tidwell.)

question: Do you refer to incoming cargoes or barges?

Mr. ROCHE.—Q. I intended that you should answer with reference to both.

A. As to incoming cargoes, the book shows the amount of coal which has been discharged from day to day, the place or receptacle where it has been discharged; for instance, on April 2d, 1906, the steamer "Reidar" was being discharged; on this particular day [283—229] 324 tons, 520 pounds were placed in the wharf bunker; 76 tons, 960 pounds in the wharf bunkers, with the letters "G F" on the side, with which I am not familiar. 2418 tons, 315 pounds were placed in the yard bunkers; 192 tons, 910 pounds in the offshore bunkers; 1504 tons, 810 pounds in the yard; 566 tons, 700 pounds in the barge "Comanche"; 422 tons, 370 pounds in the—it seems to be "Oriental," I don't know just what that refers to. 307 tons, 340 pounds were placed on the brig "Bonanza," making a total discharge out of this ship of 5,811 tons, 210 pounds. This was not the first date of discharge of this vessel.

Q. Was that the last date of discharge of the vessel, according to these books?

A. It seems to be the last date of discharge of the vessel.

Q. Let me ask you this question with reference to these entries generally; the defendant, Mills, kept in that book, did he not, entries showing the quantity of coal discharged from these importing vessels each day? A. Yes, sir.